Supreme Court, U.S.
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No. (1) 06-394

In the
Supreme Court of the United States

SUZANNE FLIGIEL, M.D.,
Petitioner,

v.

ANTHONY J. PRINCIPI, in his capacity as Secretary, Department of Veterans Affairs,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether *Lindahl* authorizes, or *Fausto* precludes, judicial review when an agency denies a permanent non-preference excepted service employee subject to the Department of Veterans Affairs Health-Care Personnel Act of 1991 the *Loudermill* "root requirements" of notice and opportunity to respond required by the statute before imposing a "major adverse" personnel action.

Whether the Sixth Circuit opinion conflicts with *Chevron* because its opinion failed to find evidence of a specific Congressional intent to preclude judicial review of "an agency action...found to be—(D) without observance of procedure required by law;" 5 U.S.C. 706, as required by a reasonable agency interpretation issued shortly after the Administrative Procedure Act's (APA) passage in 1946.

PARTIES TO THE PROCEEDINGS

Petitioner is Suzanne Fligiel, M.D.

Respondent is Anthony J. Principi, in his capacity as Secretary, Department of Veterans Affairs

Individual Defendants Michael K. Samson, M.D., and all other individual defendants were dismissed by stipulation and order of the trial court.

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The Sixth Circuit Court Order denying the rehearing en banc dated 06/16/06 is unreported and is reproduced at App. A at 1a.

The 3/7/06 Sixth Circuit Court Amended Opinion is reported at 440 F.3rd 747 and is reproduced at App. B at 3a.

The 11/10/05 Sixth Circuit Court Opinion is reported at 428 F.3d 621 and is reproduced at App. C at 18a.

The 2/10/04 District Court Order is unreported and is reproduced at App. D at 33a.

The 8/26/03 District Court Order is unreported and is reproduced at App. E at 40a.

The 8/26/03 District Court Judgment is unreported and is reproduced at App. F at 52a.

The 10/21/02 District Court Order is unreported and is reproduced at App. G at 54a.

The 1/31/01 District Court Order is unreported and is reproduced at App. H at 58a.

JURISDICTION

The Amended Opinion of the United States Court of Appeals for the Sixth Circuit was filed on March 7, 2006, and the denial of a rehearing en banc was entered on June 16, 2006. This petition is timely under 28 U.S.C. § 2101 and Supreme Court Rule 13.1 because it is being filed within 90 days of the entry of the order sought to be reviewed of June

16, 2006. This court has jurisdiction to review the order of the United States Court of Appeals for the Sixth Circuit pursuant to 28 U.S.C. § 1254.

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are as follows:

1. Selected provisions in the Administrative Procedure Act (APA), 5 U.S.C. §§ 701,706, set out in App. I at 70a.

2. Selected provisions of the Civil Service Reform Act of 1978 (CSRA), 5 U.S.C. §§7511-7513, set out at App. J at 72a.

3. Selected provisions of the Department of Veterans Affairs Health-Care Personnel Act of 1991 (VAPA), 38 U.S.C. §§7401, 7461-7463, set out at App. K and L at 77a, 78a and 38 U.S.C. § 4110 (amended and recodified by the preceding sections), set out at App. P at 112a.

STATEMENT OF THE CASE

The jurisdiction of the United States District Court for the Eastern District of Michigan and the United States Court of Appeals for the Sixth Circuit was invoked under 28 U.S.C. §1331 (general federal question jurisdiction). Two statutory claims under the VAPA were based on defendant's failure on separate occasions to provide the notice and opportunity to respond to charges required by VAPA (38 U.S.C. §§ 7462(b)(1), made applicable by 7463(c)(1), App. L at 80a, 84a), before imposing "major adverse [personnel] action[s]" (38 U.S.C. §7461(c)(2), App. L at 79a) on a permanent non-preference excepted service federal government employee of the Department of Veterans Affairs.

The Supreme Court should grant the Petition for Certiorari because the Sixth Circuit has decided an important question of federal law that has not been settled by the Court, but should be (S. Ct. Rule 10c). The question is the right to judicial enforcement of statutory due process rights that incorporate the "root requirements" described in *Cleveland Board of Education v. Loudermill,* 470 U.S. 532, 542 (1984).

The Amended Opinion is also in conflict with controlling Supreme Court precedent (S. Ct. Rule 10c). In its Amended Opinion the Sixth Circuit opinion failed to defer to a reasonable agency interpretation that requires proof of preclusion of judicial review specific to the type of legal question presented for review under the APA, 5 U.S.C. §701, set out at App. I at 70a, resulting in a conflict with *Chevron U.S.A. v. Natural Resources Defense Council,* 467 U.S. 837 (1984). The legal question presented for review involved a statutory due process question and did not/could not involve review of a factual question because there was simply no agency record to review.

The Sixth Circuit having decided that judicial review is precluded by *United States v. Fausto*, 484 U.S. 439 (1988), the following statement of the case uses the findings of fact and conclusions of law in various orders of the district court (paragraphs 1-7 from App. D, E, G and H at 33a, 40a, 54a, and 58a, respectively).

1. On October 20, 1999, Petitioner was summarily removed from her position as Associate Chief of Staff for Pathology and Laboratory Medicine at the VA hospital in Detroit and given a disciplinary transfer to the Ann Arbor VA, without being given a notice of charges and an opportunity to respond. The government characterized the action as both a "detail" and "reassignment" and denied any

obligation to give notice and an opportunity to respond (App. E at 41a and App. H at 63a).

2. On June 2, 2000, Petitioner filed a Complaint with two causes of action: 1. violation of her due process rights under 38 U.S.C. 7461-7463 and 2. a *Bivens* type action (*Bivens v. Six Unknown Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1982) based on the due process violations (App. H at 62a, 67a). On October 10, 2000, a third count of gender discrimination was added. (App. H, n.2, at 60a).

3. In the Summary Judgment Order of January 31, 2001, Judge Cook struck the statutory cause of action on the grounds that the personnel action was a "reassignment," and not a "major adverse action," relying on the representations of the government (App. H at 65a). He also struck the constitutional cause of action because there was a comprehensive statutory scheme to address adverse personnel actions, citing, *inter alia*, *Jones v. Tennessee Valley Authority*, 948 F.2d 258 (CA6, 1991)(which, at 262, relied in part on *Bush v. Lucas*, 462 U.S. 367 (1983)(App. H at 67a).

4. On October 15, 2001, Petitioner was transferred to the Saginaw VA (App. G at 54a) on the grounds that the detail was being terminated.

5. The Trial Judge authorized a Third Amended Complaint (App. G at 54a) containing a claim of denial of statutory due process for the second transfer. As a result of the existing Summary Judgment Order, Petitioner did not renew the constitutional claim.

6. On August 23, 2003, Judge Cook reversed the Summary Judgment finding following a Fed. R. Civ. P. 54(b) motion, holding that the earlier government representations

were "only a pretext for disciplinary action" (App. H at 46a) and that major adverse personnel actions had occurred without the notice of charges and an opportunity to respond required by statute. However, the district court declined the request to set aside the Summary Judgment Order (which would have renewed both the statutory and the constitutional claims) on the grounds of "harmless error" (App. H at 50a). In its Order, the district court found *Fausto* inapplicable because the plaintiff in *Fausto* had received the required due process of notice and an opportunity to respond (App. H at 48a).

7. Petitioner filed a Fed. R. Civ. P. Rule 59 motion urging that "harmless error" was inappropriate because violation of statutory requirements that incorporated *Loudermill* "root requirements" represented a serious structural error because the agency failed to create any record and that such an omission was not subject to "harmless error" relying on the analysis of *Arizona v. Fulminante,* 499 U.S. 279 (1991) and *United States v. Leonard Cotton,* 535 U.S. 625 (2002). Moreover, Petitioner argued that the district court's use of "harmless error" violated *Securities and Exchange Commission v. Chenery Corp* (*Chenery II*), 332 U.S. 194 (1947), because it relied on trial testimony 4½ years later and not on an agency record made before the final agency action. However, the District Court treated the motion as an attempt to revive the constitutional claim and denied the motion as untimely and outside the scope of the trial Order (App. D at 38-39a) in light of Petitioner's failure to reassert the constitutional claim in amended claims following the Summary Judgment Order dismissing the *Bivens* claim on the grounds that a statutory claim was available and that the individual claims were barred on immunity grounds.

8. The Appeal to the United States Court of Appeals for the Sixth Circuit was timely filed.

9. On March 7, 2006, the appeal panel issued an Amended Opinion (App B at 3a) holding that *Fausto* precluded judicial review and directing the district court to dismiss the case. In an added footnote, the court declined to "reach the issue of whether the preclusion of review extends to due process claims based on the United States Constitution" (Id. n. 5 at 17a) on the ground that Appellant challenged only the statutory due process violation.

10. On June 16, 2006, the panel denied a petition for rehearing (App. A at 1a).

REASONS FOR GRANTING THE PETITION

The Sixth Circuit relied on *Fausto*, *supra,* as controlling precedent in holding that judicial review was precluded under the APA for Petitioner's "major adverse [personnel] action" arising under the VAPA (38 U.S.C. §§ 7401, 7461-7463, App. K and L, at 77a and 78a))(*Fligiel,* App. B at 17a). The Appeal Opinion found that, like the CSRA, the VAPA was a comprehensive statute that barred jurisdiction under other statutes, including in this group the APA. It then considered the structure of VAPA and found that explicit provision for full judicial review for a major adverse action based on one particular type of behavior (not at issue in this case) coupled with the statute's silence regarding judicial review of major adverse actions for any other reasons evidenced Congress' intent not to provide judicial review when statutory due process was denied for major adverse actions based on other reasons (App. B at 15a).

The problem with the analogy is that it failed to distinguish between fact and procedural questions. In *Fausto*, *supra* at 443, the petitioner was mounting a second challenge to the substantive adverse personnel decision using another statute, the Back Pay Act, 5 U.S.C. §5596, and not the CSRA. However, in the present case Petitioner is challenging the denial of procedural rights contained in the VAPA. The APA was employed because it is the standard common pathway for challenging agency actions and jurisdiction under the APA is provided under *Bell v. New Jersey*, 461 U.S. 773, 792 (1983) "even without an explicit provision for judicial review," absent a "clear and convincing" showing that review is precluded under 5 U.S.C. 701 (App. I at 70a), *Abbott Laboratories v. Gardner,* 387 U.S. 136, 141 (1967). Moreover, *Bowen v. Michigan Academy of Family Physicians,* 476 U.S. 667, 674 reaffirmed *Abbott Laboratories's* conclusion, *supra* at 141, that "[the] mere fact that some acts are made reviewable should not suffice to support an implication of exclusion as to others."

Thus, the Sixth Circuit has "decided an important question of law that has not been decided by the Court, but should be" (S. Ct. Rule 10(c)) - the right to judicial enforcement of statutory due process rights that incorporate the *Loudermill* "root requirements" and are part of a comprehensive statute governing personnel matters. Moreover, by conflating the two separate legal questions of substance and process, the Appeal Opinion conflicts (S. Ct. Rule 10(c)) with *Chevron, supra* at 844, because it failed to defer to a "reasonable" interpretation of the APA by the Department of Justice requiring that proof of preclusion be specific to the type of legal question involved (Attorney General's Manual on the Administrative Procedures Act, 1947, App. M at 89a).

In light of the arguments set out below and the potential "disruptive practical consequences" (*Southern Railway Co. v. Seaboard Allied Milling Corp.*, 442 U.S. 444 (1979) of the decision on the employment rights of the approximately 80,000 permanent health professionals (http://www.opm.gov/feddata/html/2004/november /table11.asp) appointed under 38 U.S.C. §7401 (App. K at 77a) in the excepted service of the U.S. Department of Veterans' Affairs Petitioner urges that the petition for a writ of certiorari be granted. In all branches of the federal government, there are over 1,100,000 excepted service employees (*ibid.*) who are similarly situated with respect to the right to rely on a statutory right to have notice and an opportunity to respond to charges under 5 U.S.C. § 7513 (App J at 75a) before the imposition of a career-affecting major adverse personnel action.

I. *Fausto* is distinguishable on its facts since Appellant in that case had received all required due process.

In *Fausto*, *supra* at 441, the aggrieved employee was notified by the Department of the Interior Fish and Wildlife Service that it intended to dismiss him for a number of reasons. The employee's position was in the excepted service and his procedural rights were specified in the CSRA. As required by the statute, 5 U.S.C. §7513 (App. J at 75a), the employee received notice of the charges and replied. He subsequently received a notice of dismissal. Because the department had not informed him of his right to grieve the matter, it conducted a formal grievance procedure at his request and, after review of the file without a hearing, changed the dismissal to a suspension of 30 days.

The employee then challenged the basis for the suspension by claiming backpay under another statute, the Back Pay Act

(5 U.S.C. §5596), for the period of the suspension, claiming that the suspension was unwarranted (the Merit System Protection Board (MSPB) had dismissed his appeal because it lacked jurisdiction under the CSRA).

Like Mr. Fausto, Petitioner is appointed in the excepted service but she is appointed under VAPA and her procedural rights are governed by VAPA (enacted three years after *Fausto, supra*). 38 U.S.C. 7461-7463 covers the substance and procedures of disciplinary actions (App L at 78a).

The Act requires that, before the VA can bring charges "against a section [38 U.S.C.] 7401(1) employee [physicians are appointed to the VA under this section] that could result in a major adverse action" highly specific procedures are required, 38 U.S.C. 7463(c)(1), incorporating by reference the procedures described in 38 U.S.C. 7462(b)(1) (App. L at 84a, 80a). The Act defines a "major adverse action" as "any of the following: (A) Suspension. (B) Transfer. (C) Reduction in grade. (D) Reduction in basic pay. (E) Discharge," (App. L at 79a). The reference to a disciplinary action involving a transfer does not appear in the CSRA (App. J at 74a). VAPA requires the following procedure:

"...The employee is entitled to the following:

(A) At least 30 days advance written notice ...specifically stating the basis for each charge, the adverse actions that could be taken if the charges are sustained, and a statement of any specific law, regulation, policy, procedure, practice, or other specific instruction that has been violated with respect to each charge, ...
(B) A reasonable time, but not less than seven days, to present an answer orally and in writing... and to

submit affidavits and other documentary evidence in support of the answer."
38 U.S.C.7462(b)(1), incorporated by reference by 38 U.S.C. 7463 (c)(1)(App. L at 80a and 84a).

It is of interest and relevance that Congress saw fit to extend these highly detailed protections to a subset of health professionals, including physicians, appointed under §7401(1)(App. K at 77a).

The district court found that the VA provided none of these due process protections to Petitioner, a physician, in advance of the final agency action.

II. *Fausto* is also distinguishable in that the legal analysis underlying the holding in that case deals with jurisdiction to hear a challenge under an unrelated statute to the substance of an adverse personnel action. In contrast, in the present case the issue is denial of the notice and an opportunity to respond to an adverse personnel action mandated in the governing personnel statute *before* the imposition of an adverse personnel action with review sought under the APA, the common final pathway for challenging agency actions.

In *Fausto*, petitioner challenged the validity of a 30-day suspension- an adverse personnel action- under the Back Pay Act (5 U.S.C. 5596) in order to recover wages for the suspension period after the MSPB determined it did not have jurisdiction under the CSRA because petitioner was appointed as an excepted service employee, *Fausto*, at 443.

The Court held, at 455:

The Court held, at 455:

> "[t]he CSRA established a comprehensive system for reviewing personnel action taken against federal employees. Its deliberate exclusion of employees in respondent's service category from the provisions establishing administrative and judicial review for *personnel action of the sort at issue here* [italics added] prevents respondent from seeking review in the Claims Court under the Back Pay Act."

The Court cited several reasons why allowing review of the adverse action under the Back Pay Act would seriously distort the "comprehensive system" that Congress had crafted. First, it would distort the "preferred position of certain categories of employees- competitive service employees and 'preference eligibles' (veterans)," by giving non-preference excepted service employees more rights than the preferred employees, at 449-450. Second, it would prevent the development of "a unitary and consistent Executive Position on matters involving personnel action" because it would expand the involvement of review bodies beyond the MSRP and the Federal Circuit in determining the appropriateness of disputed personnel actions, at 451.

The three circuit court of appeals opinions cited in the Amended Opinion (App. B at 14a, 16a, 17a), (*Pathak v. Department of Veterans Affairs*, 274 F. 3d 28 (1st Cir., 2001); *Leistiko v. Stone*, 134 F.3d 817 (6th Cir., 1998) and *Harper v. Frank*, 985 F.2d 285 (6th Cir., 1993))(the latter two cases under other statutes), provide no support for the appeal court's position. The plaintiffs had either received notice and an opportunity to respond (*Pathak* and *Leistiko*) or the personnel action did not constitute an adverse personnel action (*Harper*).

Nor would either of the *Fausto* rationales appear to be relevant to Petitioner. Under the VAPA, physicians occupy a preferred position as a member of one of the professional groups appointed under 38 U.S.C. 7401(1) (App. K, at 77a). Employees appointed under this subsection are expressly authorized judicial review for a "major adverse action" involving a question of direct patient care or clinical competence, 38 U.S.C. §§7461(c)(2),(3) and 7462(f)(1) (App. L at 79a and 83a)(a new right introduced by VAPA for what is clearly the most serious charge a health professional can face), and are given detailed due process protections for any "major adverse action, " whether or not it involves issues of direct patient care or clinical competence, 38 U.S.C. 7462(b)(1) made applicable by 38 U.S. 7463(c)(1) (App. L, at 80a, 84a). In the present case, the district court found that Petitioner had not been given any of the detailed due process protections required before imposing a major adverse action not involving direct patient care or clinical competence.

Senator Cranston, the chairperson of the Veterans Affairs Committee, as floor manager for VAPA indicated that one of the purposes of the legislation was "[t]o ensure that title 38 employees are afforded the same fundamental rights as other Government employees in terms of their employee-management relations, while protecting the special professional nature of title 38 employment" (137 Cong Rec-S 8296, April 17, 1991, App. M at 92a) and "to provide to title 38 employees the same notice, opportunity to respond...as are provided to title 5 employees," (App. M at 95a).

Nor is the second rationale for *Fausto* applicable. The courts have played the central role in defining the elements of due process. Moreover, the issue in this case is unusually straightforward- the VA provided no process.

The Amended Opinion placed great weight on the fact that the VAPA authorized full judicial review of a determination to impose a major adverse action only where the action was based upon behavior affecting medical care or involving professional competence but was silent as to judicial review regarding major adverse actions for other reasons (App. B at 15a). The trial court found that the agency's action did "not involve issues which relate to [Petitioner's] professional conduct or competence," (App. E at 46a). Reliance on review for one issue and silence as to another is not a very strong basis for a holding. As noted earlier in the discussion, *Bowen, supra* at 674, citing *Abbott Laboratories, supra,* indicated that the "mere fact that some acts are made reviewable should not suffice to support an implication of exclusion as to others."

Something more is required and in the present case the available evidence indicates that Congress did not intend to bar review of the denial of statutory due process in Petitioner's case.

First, the VA personnel statute superseded by VAPA did not provide explicitly for judicial review, *Kletschka v. Driver*, 411 F.2d 436, 445 (2d Cir., 1969)(citing 38 U.S.C. §4110, App. P at 113a, repealed and superseded by 38 U.S.C. §§ 7461-7463, App. L at 78a) and was similar in that regard to the earlier version of the Retirement Act that was at the center of the dispute in *Lindahl, supra* at 781. However, appellate courts found jurisdiction to review alleged procedural due process violations and questions of law under both Acts. For the earlier VA statute these cases included: *Neal v. Walters*, 750 F.2d 347, 350 (5th Cir., 1984) and *Kletschka, supra;* and for the Retirement Act: *Scroggins v. United States*, 397 F.2d 295, cert. Denied, 393 U.S. 952 (1968) and numerous cases cited in n.14, *Lindahl, supra*.

Moreover, at the time of the passage of the VAPA, the Court had recently decided *Cleveland Board of Education v. Loudermill et al.*, 470 U.S. 532 (1985)(three years before *Fausto* and six years before the passage of VAPA). In *Loudermill*, joined by eight Justices in the relevant Part II, the Court forcefully rejected the three Justice plurality position in *Arnett v. Kennedy*, 416 U.S. 134, 154 (1974), that authorized Congress to set whatever due process it deemed appropriate when it created property rights in federal employment. The language of rejection was strong:

> "[I]t is settled that the 'bitter with the sweet' approach misconceives the constitutional guarantee. If a clearer holding is needed, we provide it today. The point is straightforward: the Due Process Clause provides that certain substantive rights-liberty and property- cannot be deprived except pursuant to constitutionally adequate procedures. The categories of substance and procedure are *distinct* (italics added)."

Loudermill at 541.

Under *Cannon v. University of Chicago*, 441 U.S. 677, 699 (1979) a presumption exists that Congress knew about *Loudermill* and the appellate decisions involving VAPA's predecessor when they incorporated the "root requirements," in VAPA and that they therefore anticipated that judicial enforcement would continue to be available.

However, there is no need to rely only on the presumption because there is direct evidence in the legislative history. In an earlier House version of VAPA,[1] the Committee stated:

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[1] There were minimal substantive differences between this earlier version and the final version in relevant areas. The final version

> "The Committee does not intend to change the usual course or scope of judicial review of Title 38 disciplinary cases (except in the new determinations of whether a matter involves professional conduct or competence) and intends only to codify the opportunity for judicial review presently available."

H. Rep. No. 101-466 at 32 (1990) to accompany H.R. 4557, April 26, 1990 (App. O at 99a).

Lindahl, supra, more nearly approximates the facts of Petitioner's case than *Fausto, supra,* and was not analyzed in the Sixth Circuit's opinion. In that case there was an explicit preclusion of review in the statute for determinations of disability and dependency made by the agency in the course of Civil Service retirement proceedings stated as follows- "determinations 'concerning these matters are final and conclusive and are not subject to review," Ibid., at 773. Nonetheless, the Court upheld the right to judicial review "to determine whether 'there has been a substantial departure from important procedural rights...", Ibid., at 791, in the face of repeated references to finality (final, conclusive, not subject to review).

The Court relied heavily on the distinction between factual determinations and legal and procedural questions, *supra* at 779, citing a long standing practice of federal courts in

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provided more detailed procedural requirements for a VA employee who was faced with a possible major adverse action not involving patient care or professional competence (as in the present case) and deleted a prohibition on judicial review of the Department's determination of whether a personnel action arose out of patient care or professional competence. *Compare* H. Rep. No. 101-466 at 52-56 (App. O at 97a) *with* 38 U.S.C. §§7462-7463 (App. L at 78a).

finding jurisdiction to review legal and procedural issues, *supra* at 780, and that Congress had amended the statutory language in 1980 without explicitly rejecting the judicial practice, *supra* at 782. Petitioner raised a legal question involving denial of statutory due process and *Lindahl* supports her position.

Last, in *Loudermill, supra,* the governing statute had not explicitly provided for notice and opportunity to respond before imposition of the adverse personnel action. It is difficult to believe that, with Congress' knowledge of this and other precedents and with the explicit Committee statement, that Congress intended to preclude judicial review of the denial of these important due process rights by simply reducing constitutional rights to statutory language and omitting a reference allowing judicial review. It is far more reasonable to conclude that Congress intended to continue to have these fundamental rights enforced by the courts.

III. The Amended Opinion's legal analysis conflicts with *Chevron* because the panel substituted its statutory construction of the preclusion issue in 5 U.S.C. 701(a)(1) for that of the Department of Justice's "reasonable" statutory construction.

5 U.S.C. §706(2) (App. 1 at 71a) specifies the kinds of legal disputes that federal courts are empowered to resolve. Factual disputes, including the correctness of agency adverse personnel actions, with their accompanying analytic review standards ((A)-arbitrary/capricious, (E)- substantial evidence and (F)- trial de novo) are listed separately from constitutional (B), legal authority (C) and procedural (D) disputes. *Loudermill* reaffirmed that the "categories of substance and procedure are distinct," *supra* at 541. This distinction should

be valid regardless of whether the procedural error is characterized as a constitutional or statutory error.

5 U.S.C. §701(a)(1) (App. I at 70a) indicates that judicial review for various kinds of legal questions can be precluded by statute. The heavy burden of establishing this has already been discussed.

However, there is still the question of how that intent must be manifested with respect to the various sub-parts of 5 U.S.C. §706(2). In a construction of the APA shortly after its passage (Attorney General's Manual on the Administrative Procedure Act, 1947, excerpts at App. M at 86a) the Department of Justice construed the preclusion requirement as meaning that, to establish preclusion, there must be proof of an intent to preclude specifically related to the particular sub-part of the cited subsection:

> "the introductory clause of section 10 [now codified at 5 U.S.C. §701, (App. I at 70a)] provides a most important principle of construction for reconciling the provisions of the section with other statutory provisions relating to judicial review. All of the provisions of section 10 are qualified by the introductory clause [including 10(e), the subpart dealing with scope of review], '*Except so far as* [italics in original] (1) statutes preclude review...', with the clear result that some other statute, while not precluding review altogether, will have the effect of preventing the application of some of the provisions of section 10." (App. M at 89a).

The Amended Opinion failed to recognize and follow the Department of Justice's reasonable construction. It conflated the substantive with the procedural when it held that Petitioner

was "precluded from invoking the protections of the APA to obtain the judicial review of her adverse employment action," (App. B at 13a). In fact, Petitioner could not contest the adverse employment action because there was no agency record but was contesting an earlier step in the administrative process. This was the failure to provide notice and an opportunity to respond that would have yielded a record on which to base the substantive decision. The Amended Opinion failed to identify any text in the statute or legislative history that indicated Congress intended to preclude judicial review of the violation of all statutory due process requirements

The issue of review of the substantive decision could not be submitted to the courts since there was simply no record for the courts to review. *Securities and Exch. Comm'n v. Chenery Corp,* 332 U.S. 194, 196 requires that

> "a reviewing court, ...must judge the propriety of such action solely by the grounds invoked by the agency...the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis."

The subsequent trial, on counts of gender discrimination and violation of statutory due process rights 4½ years after the violation is properly classified as a "post hoc rationalization" expressly forbidden as a basis for judicial review by *Burlington Truck Lines, Inc. v. United States,* 371 U.S. 156, 168-169 (1962).

Petitioner contends that the Amended Opinion's failure to distinguish between a full judicial review of substance and a judicial review confined to due process issues and its failure to focus on whether Congress intended to preclude review of

procedural violations (see previous section) represents a failure to follow the agency's reasonable construction of 5 U.S.C. §706 (App. I at 71a) and conflicts with *Chevron, supra.*

IV. The potential "disruptive practical consequences" of the Circuit's opinion raise an issue of exceptional public importance and merit a grant of certiorari.

In *Southern Railway Co. v. Seaboard Allied Milling Corp,* 442 U.S. 444, 457 (1979) the Court found support for its holding not to allow reviewability of the Interstate Commerce Commission's decision not to investigate or consider the illegality of proposed increases in railroad transportation charges in the "disruptive practical consequences" that would follow an opposite holding. The Court expressed concern that a contrary decision would adversely affect the functioning of the agency by vastly increasing its workload in mandating review of greatly increased numbers of rates.

In its Amended Opinion, the Sixth Circuit has transformed mandatory statutory agency responsibilities into precatory ones, subject to the whims of VA administrators. It precluded review under VAPA and indicated that a challenge to the denial of these statutory due process would have to be made using a constitutional claim, Amended Opinion (App. B n.5 at 17a). In order to find out why they have been subjected to a "major adverse action" excepted service employees will have to file a long and costly civil action and pursue discovery to get information that Congress thought it was mandating in VAPA, assuming that *Bush v. Lucas, supra,* would not constitute a bar. There is no evidence that Congress contemplated such an inefficient process.

It requires no reach to visualize the resulting "disruptive practical consequences," of the current holding as excepted service employees postpone making professional decisions as they attempt to ascertain whether their decision may offend one of their supervisors. As noted above, there are over one million excepted service employees (over 80,000 in the VA) affected in the federal government by the Sixth Circuit's opinion if it is not reversed. This result would frustrate achievement of one of Congress' purposes in amending Title 38 in 1991, that of "protecting the special professional nature of Title 38 employment." Cong Rec. 8296, April 17, 1991 (App. N at 92a).

Nothing in the statute, the legislative history or the Court's precedents require the courts to stand helplessly by in the face of this clear violation of the due process rights accorded to excepted service VA employees in VAPA.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 04-1531

[Filed June 16, 2006]

SUZANNE FLIGIEL, M.D.,

Plaintiff-Appellant,

v.

MICHAEL K. SAMSON, M.D., ET AL.,

Defendants,

ANTHONY J. PRINCIPI, IN HIS CAPACITY AS SECRETARY, DEPARTMENT OF VETERANS AFFAIRS,

Defendant-Appellee.

BEFORE: DAUGHTREY, MOORE, and MCKEAGUE, Circuit Judges.

ORDER

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/_____
Leonard Green, Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 04-1531

[Filed March 7, 2006]

SUZANNE FLIGIEL, M.D.,
Plaintiff-Appellant,

v.

MICHAEL K. SAMSON, M.D., et al.,
Defendants,

ANTHONY J. PRINCIPI, in his capacity as Secretary, Department of Veterans Affairs,
Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of Michigan at Detroit
No. 00-72512
Julian A. Cook, Jr., District Judge

Before: DAUGHTREY, MOORE, and McKEAGUE, Circuit Judges.

AMENDED OPINION

McKEAGUE, Circuit Judge. This is an appeal of the district court's refusal to set aside its grant of summary judgment to the Veterans Administration (VA) in a suit brought by a physician who was transferred to a VA facility without notice and an opportunity to respond, as required by statute and Veterans Administration agency regulations. The district court found that Dr. Suzanne Fligiel's transfer was a "major adverse action," entitling her to procedural protections, including advance notice and an opportunity to respond. However, the court held that the denial of procedural due process was harmless error and granted the VA summary judgment.

On appeal, Fligiel argues that the application of the harmless error test was inappropriate under *Wilson v. Social Security*, 378 F.3d 541 (6th Cir. 2004), and that the district court wrongly relied on information outside of the agency record in making its determination. It is unnecessary to address these claims on the merits, however, because we find that judicial review of this matter was precluded in the first instance. Therefore, we vacate the district court's grant of summary judgment to the VA, with remand to the district court for an entry of dismissal pursuant to *United States v. Fausto*, 484 U.S. 439, 108 S. Ct. 668, 98 L. Ed. 2d 830 (1988).

I. BACKGROUND

A. Factual Background

Suzanne Fligiel M.D., began working for the John D. Dingall Veterans Administration Medical Center ("VAMC") in Detroit in 1985, and by 1992, she had advanced to the position of Chief of Pathology and Laboratory Medicine Services ("PALMS"). While serving as the Chief of PALMS,

Fligiel was involved in various disputes with both her staff and her supervisors. Physicians working in her department complained that Fligiel had an overbearing managerial style, and several members of the staff complained to Fligiel's superiors. Fligiel was also resistant to the VAMC's new partnership with Wayne State University and the Detroit Medical Center, which caused concern with her supervisors and colleagues. Her official proficiency reports, however, were highly complimentary of her work with the department at least through 1995.

On October 20, 1999, Fligiel was called to a meeting with Dr. Samson, her supervisor at the VAMC. He informed her that she was being "detailed" to the PALMS department at the VAMC in Ann Arbor, Michigan, and that she was being reassigned from her position as Chief of PALMS to a staff physician position. The reassignment led to a net loss in Fligiel's annual salary of $13,400.00.

At the time of the detail, Samson told Fligiel that he was frustrated by her lack of cooperation with the partnership efforts and by the negative and hostile work climate that was the product of her management style. He advised her to report to personnel, and told her she would be escorted out of the building by the VA police. Fligiel did not report to personnel, and left the VAMC down a back stair case. She contacted her counsel immediately. On November 4, her attorneys sent a letter to the Detroit VAMC requesting all records relating to Fligiel's employment, as well as a copy of the VA grievance procedures. Shortly thereafter, Fligiel's counsel sent a letter to Dr. Thomas L. Garthwaite, Acting Under Secretary for Health and the Chief Medical Director of the Department of Veterans Affairs, requesting an appeal to the Disciplinary Appeals Board ("DAB"). Dr. Garthwaite responded via letter

dated December 10, 1999, stating that Fligiel's proper recourse was through VA grievance procedures.

Fligiel received a memorandum dated January 4, 2000, that rescinded her reassignment from her position as Chief, though this did not change the amount of her salary. Several days later, Fligiel's counsel received a letter from the Department of Veterans Affairs counsel stating that Fligiel's only option for redress was through the Equal Employment Opportunity Commission.

In October 2001, Fligiel received notice that she was being permanently reassigned to a staff physician position in Saginaw, Michigan. Fligiel accepted this transfer, but she filed a formal complaint with the VA's Office of Resolution Management. Fligiel received a response regarding her administrative grievance in February 2002, informing her that the reassignment was in compliance with VA regulations.

B. Procedural Background

In June 2000, Fligiel sued Michael K. Samson, M.D., (Chief of Staff at the Detroit VAMC), Thomas L. Garthwaite, M.D., (Deputy Under Secretary for Health, Department of Veterans Affairs), Togo D. West, Jr., (Secretary of Veterans Affairs), and the Department of Veterans Affairs in federal district court. The complaint sought damages for violations of 38 U.S.C. §§ 7461-7464 (Veterans' Benefits, Disciplinary and Grievance Procedures), and for a *Bivens* claim based on a Fifth Amendment violation. With regard to the § 7461 argument, Fligiel asserted that her transfer to the Ann Arbor VAMC amounted to a major adverse action, entitling her to statutory procedural protections. The defendants filed a motion to dismiss or, alternatively, for judgment on the pleadings on September 5, 2000, arguing that the district

court lacked jurisdiction under the APA and under 38 U.S.C. § 7461 *et seq.*; that the *Bivens* claim was prohibited under *Bush v. Lucas*, 462 U.S. 367, 103 S. Ct. 2404, 76 L. Ed. 2d 648 (1983), and that the claims were barred on both sovereign and qualified immunity grounds.

Fligiel filed for partial summary judgment on September 29, 2000, and on October 10, 2000, she filed an amended complaint that added an additional claim for sex discrimination under Title VII. On January 31, 2001, the district court entered an order granting the defendant's request for summary judgment, finding that the detail did not constitute a major adverse action so that Fligiel was not entitled to a hearing before the DAB, that the *Bivens* claim was barred, and the constitutional claim was invalid on the basis of the sovereign immunity of Samson, Garthwaite, and West, and the qualified immunity of Samson.

Fligiel filed two additional amended complaints: the first of these added a claim that the Saginaw transfer was retaliation for the prior complaint of sex discrimination, and the second added a claim that the transfer to Saginaw was a major adverse action, and Fligiel was denied her statutory rights to notice and a hearing under 38 U.S.C. § 7462 and the APA. On April 8, 2003, a verdict form was filed stating that Fligiel failed to prove the elements of sex discrimination with regard to the transfers to the Ann Arbor VAMC and the Saginaw VAMC.

In May 2003, Fligiel submitted a brief requesting that the court reverse the January 31, 2001, grant of summary judgment on the basis of the later trial testimony and exhibits. In this brief, Fligiel argued that Dr. Samson's trial testimony made it clear that the personnel actions taken in her case amounted to a permanent transfer rather than a detail, and

were based in part on professional conduct or competence. The court entered an order on August 26, 2003, denying the request for a reversal of the earlier decision. However, the court did set aside its earlier determination that the action taken against Fligiel was not a major adverse action, in light of the events occurring and evidence gathered since that earlier date. The court found that Fligiel's relocation to the Ann Arbor VAMC was a major adverse action, but that this transfer was not based on professional conduct or competence. Thus, Fligiel was still not entitled to a review by the DAB pursuant to 38 U.S.C. § 7462. Fligiel filed a motion to amend the judgment, which the court denied. She then filed this appeal.

II. JURISDICTION AND STANDARD OF REVIEW

The district court claimed jurisdiction pursuant to 28 U.S.C. § 1331, relying on the Veterans' Benefits Act, 38 U.S.C. § 7461 *et seq*; and the Administrative Procedure Act, 5 U.S.C. § 701 *et seq*. Appeal to this court was made pursuant to 28 U.S.C. § 1291. However, after reviewing these statutes in light of applicable case law, we find that judicial review of this matter was precluded.

When this court is reviewing a district court's opinion as to an agency action, it will use a *de novo* standard of review. *Steeltech, Ltd. v . EPA*, 273 F.3d 652, 655 (6th Cir. 2001). The court will then apply the "appropriate standard of review" in looking at the agency's decision. *Steeltech*, 273 F.3d 652, 655.

III. STATUTORY PROCEDURAL RIGHTS

A. Fligiel's Remedies under the Veterans' Benefits Act

Veterans Administration physicians[1] are afforded procedural protections when they experience a "major adverse action," as defined by 38 U.S.C. § 7461. The statute identifies a "transfer" as such an action. § 7461(c)(2)(B). Initially, the district court agreed with the VA's description of Fligiel's relocation to the Ann Arbor VA as a "detail," an action that does not trigger any statutory protections. However, after re-examining the issue, the court agreed with Fligiel that the relocation to the Ann Arbor VAMC was a transfer.

Under Title 38, the VA's procedure for addressing a major adverse action depends upon the findings of a two step analysis. First, the action must be identified as a major adverse action within § 7461(c)(2)(B). These include suspension, transfer, reduction in grade, reduction in basic pay, or discharge. *Id.* Next, the VA must determine whether the major adverse action was the result of "professional conduct or competence." § 7461(c)(3). Questions of professional conduct or competence are defined as those involving clinical competence or direct patient care. § 7461(c)(3)(A)-(B). The determination as to whether the major adverse action involved a question of professional conduct or competence is a pivotal one. Adverse actions involving professional conduct or competence are governed

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[1] 38 U.S.C. § 7401 describes the health care professionals appointed within the VA system entitled to receive the procedural protections described in 38 U.S.C. §§ 7461-64.

by the procedures outlined in § 7462, while adverse actions that do not involve such a question are controlled by § 7463.

Fligiel's transfer to the Ann Arbor VAMC in October of 1999 was a major adverse action. The district court found that she was transferred for reasons other than professional conduct or competence, invoking the protections of § 7463. Under the statute, the employee is entitled to "(A) an advance written notice stating the specific reason for the proposed action, and (B) a reasonable time to answer orally and in writing and to furnish affidavits and other documentary evidence in support of the answer." § 7463(c)(2)(A)-(B). Additionally, the statute provides for internal grievance procedures, including the "right to formal review by an impartial examiner" and a right to have the examiner's findings reviewed "by an official of a higher level than the official who decided upon the action." § 7463(d)(1)-(3). However, there is no right of judicial review afforded by the statute, and review to a Disciplinary Appeals Board ("DAB") is specifically foreclosed. § 7463(a).

On appeal, Dr. Fligiel does not contest the district court's conclusion that she was transferred for reasons other than professional conduct or competence, nor does she deny that her statutory remedies under Title 38 do not include judicial review. Dr. Fligiel relies instead on provisions of the APA to obtain judicial review.

B. Fligiel's Remedies under the Administrative Procedure Act

The district court claimed jurisdiction relying on the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-06. Under the APA, an aggrieved party may seek judicial review of final agency action if there are no other adequate

mechanisms for review, and review has not been foreclosed by statute or "committed to agency discretion by law." 5 U.S.C. § 701(a). In determining whether review is available under the APA, we are mindful of the Supreme Court's admonition that we must be "wary of interpreting the APA in a manner that precludes any judicial review of agency decisions, requiring a 'showing of clear and convincing evidence' that Congress intended to eliminate judicial review in matters of agency discretion." *UHI Inc. v. Thompson*, 250 F.3d 993, 996 (6th Cir. 2001) *citing Barlow v. Collins*, 397 U.S. 159, 167, 90 S. Ct. 832, 25 L. Ed. 2d 192 (1970).

The Secretary argued that judicial review under the APA was improper because of the holdings in *United States v. Fausto*, 484 U.S. 439, 108 S. Ct. 668, 98 L. Ed. 2d 830 (1988); and *Pathak v. Department of Veterans Affairs*, 274 F.3d 28 (1st Cir. 2001). However, the district court found these cases inapposite to the facts here. Instead, the court claimed jurisdiction, and found that the VA's procedural lapse was harmless error. We disagree with the district court in these determinations, and find that both *Fausto* and *Pathak* are on point. Further, we have denied judicial review in reliance on *Fausto* in similar circumstances. *See Leistiko v. Stone*, 134 F.3d 817 (6th Cir. 1998), *and Harper v. Frank*, 985 F.2d 285 (6th Cir. 1993). We agree with the Secretary that Fligiel may not gain judicial review in reliance on the APA, because there is clear and convincing evidence that Congress precluded review for the type of harm she suffered.

In *United States v. Fausto*, 484 U.S. 439, 108 S. Ct. 668, 98 L. Ed. 2d 830 (1988), the Supreme Court held that an employee governed by the Civil Service Reform Act ("CSRA") was foreclosed from invoking other statutory means of judicial review, because the CSRA is the comprehensive remedial scheme for such individuals. *Fausto*,

484 U.S. 439, 448-49, 108 S. Ct. 668, 98 L. Ed. 2d 830. Fausto was an employee of the Fish and Wildlife Service, subject to the CSRA. *Fausto*, 484 U.S. 439, 442-43, 108 S. Ct. 668, 98 L. Ed. 2d 830. After exhausting his administrative remedies, Fausto attempted to obtain judicial review of his adverse personnel action through the Back Pay Act, because the CSRA did not provide judicial review for the type of adverse action he suffered. *Fausto*, 484 U.S. 439, 447, 108 S. Ct. 668, 98 L. Ed. 2d 830. The Court held that providing judicial review pursuant to an alternate statute would undermine the purpose of the CSRA; namely providing the comprehensive catalog of remedial measures for the employees regulated by the Act. *Fausto*, 484 U.S. 439, 448-50, 108 S. Ct. 668, 98 L. Ed. 2d 830.

The Court ruled that Congress intended the CSRA to "replace the haphazard arrangements for administrative and judicial review of personnel action, part of the 'outdated patchwork of statutes and rules built up over almost a century' that was the civil service system." *Fausto*, 484 U.S. 439, 444, 108 S. Ct. 668, 98 L. Ed. 2d 830 (citation omitted). Further, the court noted that Congress enacted the CSRA, "which replaced the patchwork system with an integrated scheme of administrative and judicial review, designed to balance the legitimate interests of the various categories of federal employees with the needs of sound and efficient administration." *Fausto*, 484 U.S. 439, 446, 108 S. Ct. 668, 98 L. Ed. 2d 830. The Court reasoned that granting federal employees governed by the CSRA judicial review by invoking the protections of other federal statutes would undermine the comprehensive aim of the CSRA. *Id.*

Further, the court reasoned that the absence of a provision allowing judicial review of Fausto's adverse personnel action in the CSRA was an indication that Congress did not intend

employees to have such a right. *Fausto*, 484 U.S. 439, 448-9, 108 S. Ct. 668, 98 L. Ed. 2d 830. "It seems to us evident that the absence of provision for these employees to obtain judicial review is not an uninformative consequence of the limited scope of the statute, but rather manifestation of a considered congressional judgment that they should not have statutory entitlement to review for adverse action of the type governed by Chapter 75." *Id.*

Applying the holding in *Fausto* to the facts here, we find that Fligiel is precluded from invoking the protections of the APA to obtain the judicial review of her adverse employment action that she was denied by the Veterans' Benefits Act. Like the CSRA, Title 38 provides a comprehensive regulatory scheme for employees of the VA. In particular, § 7463 outlines the procedures Congress intended to provide for review of adverse actions of the type Fligiel encountered. Fligiel was entitled to "(A) an advance written notice stating the specific reason for the proposed action, and (B) a reasonable time to answer orally and in writing and to furnish affidavits and other documentary evidence in support of the answer." § 7463(c)(2)(A)-(B). In addition, internal grievance procedures were available. § 7463 (d)(1)-(3). However, there is no provision for judicial review conferred by § 7463, in contrast to § 7462.[2]

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[2] 38 U.S.C. § 7462 does provide for judicial review of an adverse agency action involving "professional conduct or competence." It is apparent that Congress wanted to limit the availability of judicial review to well defined circumstances. While the district court acknowledged that Fligiel suffered a major adverse action, it found the action did not arise out of a question of professional conduct or competence. Therefore, Fligiel was not entitled to the procedural protections of § 7462, including judicial review.

Fligiel's attempt to acquire judicial review relying on provisions of the APA is ill fated. Under *Fausto,* where a comprehensive remedial scheme exists to address agency adverse actions, and Congress has clearly indicated that no judicial review is available, an individual may not choose other federal statutory avenues to obtain review. *Fausto*, 484 U.S. 439, 455, 108 S. Ct. 668, 98 L. Ed. 2d 830. "The CSRA established a comprehensive system for reviewing personnel action taken against federal employees. Its deliberate exclusion of employees in respondent's service category from the provisions establishing administrative and judicial review for personnel action of the sort at issue here prevents respondent from seeking review in the Claims Court under the Back Pay Act." *Id.* Like Fausto, Fligiel was entitled to specific procedural remedies under Title 38, which did not include judicial review. She cannot now rely on the procedural protections of the APA.

The First Circuit addressed this very issue in *Pathak v. Department of Veterans Affairs*, 274 F.3d 28 (1st Cir. 2001). Pathak was a VA physician governed by the provisions of the Veterans' Benefits Act. *Id.* Like Fligiel, Pathak was subject to a major adverse action not involving professional conduct or competence. *Pathak*, 274 F.3d 28, 32. He, too, was entitled to the statutory protections of 38 U.S.C. § 7463, which do not include judicial review. Pathak attempted to use the APA to acquire judicial review of his adverse action. *Id.*

In deciding whether Pathak was entitled to judicial review under the APA, the First Circuit stated:

> [I]t was Dr. Pathak's actions as an employee and as a supervisor that were at issue, not his clinical competence or direct patient care. In contrast with § 7462, which provides judicial review of discipline

> based on professional conduct or competence, Congress provided no right of review in § 7463, which governs discipline unrelated to professional conduct or competence. Congress's express provision of judicial review in § 7462, coupled with a complete omission of judicial review in § 7463 -- the provision governing Pathak -- is "persuasive evidence that Congress deliberately intended to foreclose further review of such claims."

Pathak v. Department of Veterans Affairs, 274 F.3d 28, 32 (*citing United States v. Erika, Inc.*, 456 U.S. 201, 208, 102 S. Ct. 1650, 72 L. Ed. 2d 12 (1982), *quoted in Fausto*, 484 U.S. 439, 448, 108 S. Ct. 668, 98 L. Ed. 2d 830 (1988)).

We agree with the First Circuit's analysis. Like Pathak, Fligiel may not invoke the review provisions of the APA in order to obtain the judicial review Congress intended to deny her under § 7463. We are careful to circumscribe this holding to situations such as this, where there is clear evidence that Congress did not intend to provide judicial review of agency action. In fact, § 7463 specifically precludes review of a major adverse action by a Disciplinary Appeals Board (DAB) not arising from a question of professional conduct or competence. § 7463(a). Because a review by the DAB is the first step to judicial review under § 7462, Congress forestalled the review process by eliminating board review for the type of adverse actions addressed by § 7463. It is clear that Congress wanted to limit judicial review to adverse actions only involving questions of professional conduct or competence. Fligiel's transfer to the Ann Arbor VA was not such an adverse action, and she was not entitled to judicial review.

This circuit has relied on *Fausto* to deny judicial review in other situations. In *Leistiko v. Stone*, 134 F.3d 817 (6th Cir. 1998), Leistiko was a lieutenant colonel in the National Guard and an "excepted service" federal employee governed by the CSRA. *Leistiko*, 134 F.3d 817, 818. He was terminated from his position as a Supervisory Aircraft Pilot by the Ohio Adjutant General's Department after he was medically disqualified from aviation service. *Id.* After unsuccessfully pursuing his administrative remedies, Leistiko filed suit in federal district court alleging violations of his rights under the APA.[3] *Id.* The district court dismissed the claim. *Id.* We affirmed, noting that under *Fausto*, the CSRA precluded judicial review of Leistiko's termination. *Leistiko* 134 F.3d 817, 820.

While Chapter 75 of the CSRA provided substantive and procedural rights for "removals", it expressly excluded individuals in Leistiko's employment category. *Id.* We found that this exclusion evinced clear congressional intent to deny these employees the protections, including judicial review. *Id.* "Because Col. Leistiko has thus been excluded from the protections of Chapter 75, the logic of *Fausto* is that his removal from the technicians position is not subject to judicial review." *Id.* Further, we acknowledged that the APA generally allows judicial review of final agency action when there is no other adequate remedy, *except* when other statues preclude this review. *Id.* Relying on *Fausto*, we found that the

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[3] Leistiko also alleged violations of his rights under the Constitution, the National Guard Technicians Act, the Rehabilitation Act and the Veterans Re-employment Rights Act. *Leistiko v. Stone*, 134 F.3d 817, 819 (6th Cir. 1998).

CSRA did preclude Leistiko's right of review under the APA. *Id.*[4]

Likewise, we find that the Veterans' Benefits Act effectively precludes judicial review for Fligiel. The Act's express exclusion of DAB review in 38 U.S.C. § 7463, and its inclusion of DAB review and subsequent judicial review in § 7462 clearly demonstrates congressional intent to limit review to the adverse actions governed by § 7463. Fligiel may not circumvent this limitation by invoking the judicial review provision of the APA.[5]

IV. CONCLUSION

For the aforementioned reasons, the judgment of the district court granting summary judgment to the Veterans Administration is VACATED, with REMAND to the court for an entry of DISMISSAL.

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[4] *See also Harper v. Frank*, 985 F.2d 285 (6th Cir. 1993). In *Harper*, we held that a postal worker governed by the Postal Reorganization Act (PRA) had no right to administrative or judicial review for her claim that the postal service did not follow its own regulations when it denied her a promotion. Relying on *Fausto,* we held "[in] this case, we recognize the comprehensive scheme that Congress established in the PRA for addressing review of personnel matters for postal employees, and likewise, find 'no statutory entitlement to review' within the PRA." *Id.* at 290.

[5] On appeal, Fligiel challenged the denial of *statutory* due process. Therefore, we do not reach the issue of whether the preclusion of review extends to due process claims based on the United States Constitution.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 04-1531

[Filed November 10, 2005]

SUZANNE FLIGIEL, M.D.,
Plaintiff-Appellant,

v.

MICHAEL K. SAMSON, M.D., et al.
Defendants,

ANTHONY J. PRINCIPI, in his capacity as Secretary, Department of Veterans Affairs,
Defendant- Appellee.

Before: DAUGHTREY, MOORE, and McKEAGUE, Circuit Judges.

OPINION

McKEAGUE, Circuit Judge. This is an appeal of the district court's refusal to set aside its grant of summary judgment to the Veterans Administration (VA) in a suit brought by a physician who was transferred to a VA facility without notice and an opportunity to respond, as required by

statute and Veterans Administration agency regulations. The district court found that Dr. Suzanne Fligiel's transfer was a "major adverse action," entitling her to procedural protections, including advance notice and an opportunity to respond. However, the court held that the denial of procedural due process was harmless error and granted the VA summary judgment.

On appeal, Fligiel argues that the application of the harmless error test was inappropriate under *Wilson v. Comm'r of Soc. Sec.*, 378 F.3d 541 (6th Cir. 2004), and that the district court wrongly relied on information outside of the agency record in making its determination. It is unnecessary to address these claims on the merits, however, because we find that the district court lacked subject matter jurisdiction to hear this matter in the first instance. Therefore, we vacate the district court's grant of summary judgment to the VA, with remand to the district court for an entry of dismissal for lack of subject matter jurisdiction pursuant to *United States v. Fausto*, 484 U.S. 439, 108 S. Ct. 668, 98 L. Ed. 2d 830 (1988).

I

Background

A. Factual Background

Suzanne Fligiel M.D., began working for the John D. Dingall Veterans Administration Medical Center ("VAMC") in Detroit in 1985, and by 1992, she had advanced to the position of Chief of Pathology and Laboratory Medicine Services ("PALMS"). While serving as the Chief of PALMS, Fligiel was involved in various disputes with both her staff and her supervisors. Physicians working in her department

complained that Fligiel had an overbearing managerial style, and several members of the staff complained to Fligiel's superiors. Fligiel was also resistant to the VAMC's new partnership with Wayne State University and the Detroit Medical Center, which caused concern with her supervisors and colleagues. Her official proficiency reports, however, were highly complimentary of her work with the department at least through 1995.

On October 20, 1999, Fligiel was called to a meeting with Dr. Samson, her supervisor at the VAMC. He informed her that she was being "detailed" to the PALMS department at the VAMC in Ann Arbor, Michigan, and that she was being reassigned from her position as Chief of PALMS to a staff physician position. The reassignment led to a net loss in Fligiel's annual salary of $13,400.00.

At the time of the detail, Samson told Fligiel that he was frustrated by her lack of cooperation with the partnership efforts and by the negative and hostile work climate that was the product of her management style. He advised her to report to personnel, and told her she would be escorted out of the building by the VA police. Fligiel did not report to personnel, and left the VAMC down a back stair case. She contacted her counsel immediately. On November 4, her attorneys sent a letter to the Detroit VAMC requesting all records relating to Fligiel's employment, as well as a copy of the VA grievance procedures. Shortly thereafter, Fligiel's counsel sent a letter to Dr. Thomas L. Garthwaite, Acting Under Secretary for Health and the Chief Medical Director of the Department of Veterans Affairs, requesting an appeal to the Disciplinary Appeals Board ("DAB"). Dr. Garthwaite responded via letter dated December 10, 1999, stating that Fligiel's proper recourse was through VA grievance procedures.

Fligiel received a memorandum dated January 4, 2000, that rescinded her reassignment from her position as Chief, though this did not change the amount of her salary. Several days later, Fligiel's counsel received a letter from the Department of Veterans Affairs counsel stating that Fligiel's only option for redress was through the Equal Employment Opportunity Commission.

In October 2001, Fligiel received notice that she was being permanently reassigned to a staff physician position in Saginaw, Michigan. Fligiel accepted this transfer, but she filed a formal complaint with the VA's Office of Resolution Management. Fligiel received a response regarding her administrative grievance in February 2002, informing her that the reassignment was in compliance with VA regulations.

B. Procedural Background

In June 2000, Fligiel sued Michael K. Samson, M.D., (Chief of Staff at the Detroit VAMC), Thomas L. Garthwaite, M.D., (Deputy Under Secretary for Health, Department of Veterans Affairs), Togo D. West, Jr., (Secretary of Veterans Affairs), and the Department of Veterans Affairs in federal district court. The complaint sought damages for violations of 38 U.S.C. §§ 7461-7464 (Veterans' Benefits, Disciplinary and Grievance Procedures), and for a *Bivens* claim based on a Fifth Amendment violation. With regard to the § 7461 argument, Fligiel asserted that her transfer to the Ann Arbor VAMC amounted to a major adverse action, entitling her to statutory procedural protections. The defendants filed a motion to dismiss or, alternatively, for judgment on the pleadings on September 5, 2000, arguing that the district court lacked jurisdiction under the APA and under 38 U.S.C. § 7461 *et seq.*; that the *Bivens* claim was prohibited under *Bush v. Lucas*, 462 U.S. 367, 103 S. Ct. 2404, 76 L. Ed. 2d

648 (1983), and that the claims were barred on both sovereign and qualified immunity grounds.

Fligiel filed for partial summary judgment on September 29, 2000, and on October 10, 2000, she filed an amended complaint that added an additional claim for sex discrimination under Title VII. On January 31, 2001, the district court entered an order granting the defendant's request for summary judgment, finding that the detail did not constitute a major adverse action so that Fligiel was not entitled to a hearing before the DAB, that the *Bivens* claim was barred, and the constitutional claim was invalid on the basis of the sovereign immunity of Samson, Garthwaite, and West, and the qualified immunity of Samson.

Fligiel filed two additional amended complaints: the first of these added a claim that the Saginaw transfer was retaliation for the prior complaint of sex discrimination, and the second added a claim that the transfer to Saginaw was a major adverse action, and Fligiel was denied her statutory rights to notice and a hearing under 38 U.S.C. § 7462 and the APA. On April 8, 2003, a verdict form was filed stating that Fligiel failed to prove the elements of sex discrimination with regard to the transfers to the Ann Arbor VAMC and the Saginaw VAMC.

In May 2003, Fligiel submitted a brief requesting that the court reverse the January 31, 2001, grant of summary judgment on the basis of the later trial testimony and exhibits. In this brief, Fligiel argued that Dr. Samson's trial testimony made it clear that the personnel actions taken in her case amounted to a permanent transfer rather than a detail, and were based in part on professional conduct or competence. The court entered an order on August 26, 2003, denying the request for a reversal of the earlier decision. However, the

court did set aside its earlier determination that the action taken against Fligiel was not a major adverse action, in light of the events occurring and evidence gathered since that earlier date. The court found that Fligiel's relocation to the Ann Arbor VAMC was a major adverse action, but that this transfer was not based on professional conduct or competence. Thus, Fligiel was still not entitled to a review by the DAB pursuant to 38 U.S.C. § 7462. Fligiel filed a motion to amend the judgment, which the court denied. She then filed this appeal.

II

Jurisdiction and Standard of Review

The district court claimed jurisdiction pursuant to 28 U.S.C. § 1331, relying on the Veterans' Benefits Act, 38 U.S.C. § 7461 *et seq*; and the Administrative Procedure Act, 5 U.S.C. § 701 *et seq*. Appeal to this court was made pursuant to 28 U.S.C. § 1291. However, after reviewing these statutes in light of applicable case law, we find that the district court lacked subject matter jurisdiction to adjudicate this matter.

"This court reviews *de novo* determinations on questions of subject matter jurisdiction." *Ball v. Union Carbide Corp .*, 385 F.3d 713, 729 (6th Cir. 2004). When this court is reviewing a district court's opinion as to an agency action, it will use a *de novo* standard of review. *Steeltech, Ltd. v. EPA*, 273 F.3d 652, 655 (6th Cir. 2001). The court will then apply the "appropriate standard of review" in looking at the agency's decision. *Steeltech*, 273 F.3d 652, 655.

III

Jurisdictional Analysis

A. Fligiel's Remedies under the Veterans' Benefits Act

Veterans Administration physicians[1] are afforded procedural protections when they experience a "major adverse action," as defined by 38 U.S.C. § 7461. The statute identifies a "transfer" as such an action. § 7461(c)(2)(B). Initially, the district court agreed with the VA's description of Fligiel's relocation to the Ann Arbor VA as a "detail," an action that does not trigger any statutory protections. However, after re-examining the issue, the court agreed with Fligiel that the relocation to the Ann Arbor VAMC was a transfer.

Under Title 38, the VA's procedure for addressing a major adverse action depends upon the findings of a two step analysis. First, the action must be identified as a major adverse action within § 7461(c)(2)(B). These include suspension, transfer, reduction in grade, reduction in basic pay, or discharge. *Id.* Next, the VA must determine whether the major adverse action was the result of "professional conduct or competence." § 7461(c)(3). Questions of professional conduct or competence are defined as those involving clinical competence or direct patient care. § 7461(c)(3)(A)-(B). The determination as to whether the major adverse action involved a question of professional conduct or competence is a pivotal one. Adverse actions

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[1] 38 U.S.C. § 7401 describes the health care professionals appointed within the VA system entitled to receive the procedural protections described in 38 U.S.C. §§ 7461-64.

involving professional conduct or competence are governed by the procedures outlined in § 7462, while adverse actions that do not involve such a question are controlled by § 7463.

Fligiel's transfer to the Ann Arbor VAMC in October of 1999 was a major adverse action. The district court found that she was transferred for reasons other than professional conduct or competence, invoking the protections of § 7463. Under the statute, the employee is entitled to "(A) an advance written notice stating the specific reason for the proposed action, and (B) a reasonable time to answer orally and in writing and to furnish affidavits and other documentary evidence in support of the answer." § 7463(c)(2)(A)-(B). Additionally, the statute provides for internal grievance procedures, including the "right to formal review by an impartial examiner" and a right to have the examiner's findings reviewed "by an official of a higher level than the official who decided upon the action." § 7463(d)(1)-(3). However, there is no right of judicial review afforded by the statute, and review to a Disciplinary Appeals Board ("DAB") is specifically foreclosed. § 7463(a).

On appeal, Dr. Fligiel does not contest the district court's conclusion that she was transferred for reasons other than professional conduct or competence, nor does she deny that her statutory remedies under Title 38 do not include judicial review. Dr. Fligiel relies instead on provisions of the APA to obtain judicial review.

B. Fligiel's Remedies under the Administrative Procedure Act

The district court claimed jurisdiction relying on the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-06. Under the APA, an aggrieved party may seek judicial review of final agency action if there are no other adequate

mechanisms for review, and review has not been foreclosed by statute or "committed to agency discretion by law." 5 U.S.C. § 701(a). In determining whether review is available under the APA, we are mindful of the Supreme Court's admonition that we must be "wary of interpreting the APA in a manner that precludes any judicial review of agency decisions, requiring a 'showing of clear and convincing evidence' that Congress intended to eliminate judicial review in matters of agency discretion." *UHI Inc. v. Thompson*, 250 F.3d 993, 996 (6th Cir. 2001) *citing Barlow v. Collins*, 397 U.S. 159, 167, 90 S. Ct. 832, 25 L. Ed. 2d 192 (1970).

The Secretary argued that judicial review under the APA was improper because of the holdings in *United States v. Fausto*, 484 U.S. 439, 108 S. Ct. 668, 98 L. Ed. 2d 830 (1988); and *Pathak v. Department of Veterans Affairs*, 274 F.3d 28 (1st Cir. 2001). However, the district court found these cases inapposite to the facts here. Instead, the court claimed jurisdiction, and found that the VA's procedural lapse was harmless error. We disagree with the district court in these determinations, and find that both *Fausto* and *Pathak* are on point. Further, we have denied judicial review in reliance on *Fausto* in similar circumstances. *See Leistiko v. Stone*, 134 F.3d 817 (6th Cir.1998), *and Harper v. Frank*, 985 F.2d 285 (6th Cir. 1993). We agree with the Secretary that Fligiel may not gain judicial review in reliance on the APA, because there is clear and convincing evidence that Congress precluded review for the type of harm she suffered.

In *United States v. Fausto*, 484 U.S. 439, 108 S. Ct. 668, 98 L. Ed. 2d 830 (1988), the Supreme Court held that an employee governed by the Civil Service Reform Act ("CSRA") was foreclosed from invoking other statutory means of judicial review, because the CSRA is the comprehensive remedial scheme for such individuals. *Fausto*,

484 U.S. 439, 448-49, 108 S. Ct. 668, 98 L. Ed. 2d 830. Fausto was an employee of the Fish and Wildlife Service, subject to the CSRA. *Fausto*, 484 U.S. 439, 442-43, 108 S. Ct. 668, 98 L. Ed. 2d 830. After exhausting his administrative remedies, Fausto attempted to obtain judicial review of his adverse personnel action through the Back Pay Act, because the CSRA did not provide judicial review for the type of adverse action he suffered. *Fausto*, 484 U.S. 439, 447, 108 S. Ct. 668, 98 L. Ed. 2d 830. The Court held that invoking federal jurisdiction through an alternate statute would undermine the purpose of the CSRA; namely providing the comprehensive catalog of remedial measures for the employees regulated by the Act. *Fausto*, 484 U.S. 439, 448-50, 108 S. Ct. 668, 98 L. Ed. 2d 830.

The Court ruled that Congress intended the CSRA to "replace the haphazard arrangements for administrative and judicial review of personnel action, part of the 'outdated patchwork of statutes and rules built up over almost a century' that was the civil service system." *Fausto*, 484 U.S. 439, 444, 108 S. Ct. 668, 98 L. Ed. 2d 830 (citation omitted). Further, the court noted that Congress enacted the CSRA, "which replaced the patchwork system with an integrated scheme of administrative and judicial review, designed to balance the legitimate interests of the various categories of federal employees with the needs of sound and efficient administration." *Fausto*, 484 U.S. 439, 446, 108 S. Ct. 668, 98 L. Ed. 2d 830. The Court reasoned that granting federal employees governed by the CSRA judicial review by invoking the protections of other federal statutes would undermine the comprehensive aim of the CSRA. *Id.*

Further, the court reasoned that the absence of a provision allowing judicial review of Fausto's adverse personnel action in the CSRA was an indication that Congress did not intend

employees to have such a right. *Fausto*, 484 U.S. 439, 448-9, 108 S. Ct. 668, 98 L. Ed. 2d 830. "It seems to us evident that the absence of provision for these employees to obtain judicial review is not an uninformative consequence of the limited scope of the statute, but rather manifestation of a considered congressional judgment that they should not have statutory entitlement to review for adverse action of the type governed by Chapter 75." *Id.*

Applying the holding in *Fausto* to the facts here, we find that Fligiel is precluded from invoking the protections of the APA to obtain the judicial review of her adverse employment action that she was denied by the Veterans' Benefits Act. Like the CSRA, Title 38 provides a comprehensive regulatory scheme for employees of the VA. In particular, § 7463 outlines the procedures Congress intended to provide for review of adverse actions of the type Fligiel encountered. Fligiel was entitled to "(A) an advance written notice stating the specific reason for the proposed action, and (B) a reasonable time to answer orally and in writing and to furnish affidavits and other documentary evidence in support of the answer." § 7463(c)(2)(A)-(B). In addition, internal grievance procedures were available. § 7463 (d)(1)-(3). However, there is no provision for judicial review conferred by § 7463, in contrast to § 7462.[2]

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[2] 38 U.S.C. § 7462 does provide for judicial review of an adverse agency action involving "professional conduct or competence." It is apparent that Congress wanted to limit the availability of judicial review to well defined circumstances. While the district court acknowledged that Fligiel suffered a major adverse action, it found the action did not arise out of a question of professional conduct or competence. Therefore, Fligiel was not entitled to the procedural protections of § 7462, including judicial review.

Fligiel's attempt to acquire judicial review relying on provisions of the APA to confer subject matter jurisdiction is ill fated. Under *Fausto,* where a comprehensive remedial scheme exists to address agency adverse actions, and Congress has clearly indicated that no judicial review is available, an individual may not choose other federal statutory avenues to obtain review. *Fausto*, 484 U.S. 439, 455, 108 S. Ct. 668, 98 L. Ed. 2d 830. "The CSRA established a comprehensive system for reviewing personnel action taken against federal employees. Its deliberate exclusion of employees in respondent's service category from the provisions establishing administrative and judicial review for personnel action of the sort at issue here prevents respondent from seeking review in the Claims Court under the Back Pay Act." *Id.* Like Fausto, Fligiel was entitled to specific procedural remedies under Title 38, which did not include judicial review. She cannot now rely on the procedural protections of the APA.

The First Circuit addressed this very issue in *Pathak v. Department of Veterans Affairs*, 274 F.3d 28 (1st Cir. 2001). Pathak was a VA physician governed by the provisions of the Veterans' Benefits Act. *Id.* Like Fligiel, Pathak was subject to a major adverse action not involving professional conduct or competence. *Pathak*, 274 F.3d 28, 32. He, too, was entitled to the statutory protections of 38 U.S.C. § 7463, which do not include judicial review. Pathak attempted to use the APA to acquire judicial review of his adverse action. *Id.*

In deciding whether Pathak was entitled to judicial review under the APA, the First Circuit stated:

> [I]t was Dr. Pathak's actions as an employee and as a supervisor that were at issue, not his clinical competence or direct patient care. In contrast with

> § 7462, which provides judicial review of discipline based on professional conduct or competence, Congress provided no right of review in § 7463, which governs discipline unrelated to professional conduct or competence. Congress's express provision of judicial review in § 7462, coupled with a complete omission of judicial review in § 7463--the provision governing Pathak-- is "persuasive evidence that Congress deliberately intended to foreclose further review of such claims."

Pathak v. Department of Veterans Affairs, 274 F.3d 28, 32 (*citing United States v. Erika, Inc.*, 456 U.S. 201, 208, 102 S. Ct. 1650, 72 L. Ed. 2d 12 (1982), *quoted in Fausto*, 484 U.S. 439, 448, 108 S. Ct. 668, 98 L. Ed. 2d 830 (1988)).

We agree with the First Circuit's analysis. Like Pathak, Fligiel may not invoke the review provisions of the APA in order to obtain the judicial review Congress intended to deny her under § 7463. We are careful to circumscribe this holding to situations such as this, where there is clear evidence that Congress did not intend to provide judicial review of agency action. In fact, § 7463 specifically precludes review of a major adverse action by a Disciplinary Appeals Board (DAB) not arising from a question of professional conduct or competence. § 7463(a). Because a review by the DAB is the first step to judicial review under § 7462, Congress forestalled the review process by eliminating board review for the type of adverse actions addressed by § 7463. It is clear that Congress wanted to limit judicial review to adverse actions only involving questions of professional conduct or competence. Fligiel's transfer to the Ann Arbor VA was not such an adverse action, and she was not entitled to judicial review.

This circuit has relied on *Fausto* to deny judicial review in other situations. In *Leistiko v. Stone*, 134 F.3d 817 (6th Cir. 1998), Leistiko was a lieutenant colonel in the National Guard and an "excepted service" federal employee governed by the CSRA. *Leistiko*, 134 F.3d 817, 818. He was terminated from his position as a Supervisory Aircraft Pilot by the Ohio Adjutant General's Department after he was medically disqualified from aviation service. *Id.* After unsuccessfully pursuing his administrative remedies, Leistiko filed suit in federal district court alleging violations of his rights under the APA.[3] *Id.* The district court dismissed the claim for lack of jurisdiction. *Id.* We affirmed, noting that under *Fausto*, the CSRA precluded judicial review of Leistiko's termination. *Leistiko* 134 F.3d 817, 820.

While Chapter 75 of the CSRA provided substantive and procedural rights for "removals", it expressly excluded individuals in Leistiko's employment category. *Id.* We found that this exclusion evinced clear congressional intent to deny these employees the protections, including judicial review. *Id.* "Because Col. Leistiko has thus been excluded from the protections of Chapter 75, the logic of *Fausto* is that his removal from the technicians position is not subject to judicial review." *Id.* Further, we acknowledged that the APA generally allows judicial review of final agency action when there is no other adequate remedy, *except* when other statues preclude this review. *Id.* Relying on *Fausto*, we found that the

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[3] Leistiko also alleged violations of his rights under the Constitution, the National Guard Technicians Act, the Rehabilitation Act and the Veterans Re-employment Rights Act. *Leistiko v. Stone*, 134 F.3d 817, 819 (6th Cir. 1998).

CSRA did preclude Leistiko's right of review under the APA. *Id.*[4]

Likewise, we find that the Veterans' Benefits Act effectively precludes judicial review for Fligiel. The Act's express exclusion of DAB review in 38 U.S.C. § 7463, and its inclusion of DAB review and subsequent judicial review in § 7462 clearly demonstrates congressional intent to limit review to the adverse actions governed by § 7463. Fligiel may not circumvent this limitation by invoking the judicial review provision of the APA.

IV

Conclusion

For the aforementioned reasons, the judgment of the district court granting summary judgment to the Veterans Administration is VACATED, with REMAND to the court for an entry of DISMISSAL for lack of subject matter jurisdiction.

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[4] *See also Harper v. Frank*, 985 F.2d 285 (6th Cir. 1993). In *Harper*, we held that a postal worker governed by the Postal Reorganization Act (PRA) had no right to administrative or judicial review for her claim that the postal service did not follow its own regulations when it denied her a promotion. Relying on *Fausto*, we held "[in] this case, we recognize the comprehensive scheme that Congress established in the PRA for addressing review of personnel matters for postal employees, and likewise, find 'no statutory entitlement to review' within the PRA." *Id.* at 290.

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case Number 00-CV-72512

[Filed February 10, 2004]

SUZANNE FLIGIEL, M.D.,

Plaintiff,

v.

ANTHONY J. PRINCIPI, in his capacity as Secretary, Department of Veterans Affairs,

Defendant.

ORDER

On August 26, 2003, the Court entered an Order in which it concluded that the Defendant, Anthony J. Principi, in his capacity as the Secretary for the Department of Veterans Affairs (Secretary), had violated the statutory rights of the Plaintiff, Suzanne Fligiel, M.D., to receive an advance notice of, as well as an opportunity to be heard at, an administrative disciplinary hearing pursuant to 38 U.S.C. §§ 7461-7463. However, based upon the same evidentiary record, and

inasmuch as the applicable statutes did not grant Fligiel any rights to appeal the decision of the Secretary, the Court also determined that his failure to provide these statutory due process protections was a harmless error. Thus, the Court denied Fligiel's request to be reinstated as the Chief of Pathology and Laboratory Medical Services at the John D. Dingell VA Medical Center in Detroit, Michigan.

On September 10, 2003, Fligiel filed the instant motion pursuant to Fed. R. Cir. P. 59(e) to alter or amend the August 26th Order. For the reasons that have been set forth below, her request must be denied.

I

On June 2, 2000, Fligiel initiated this action when she filed a Complaint against Michael K. Samson, Thomas L. Garthwaite, the Department of Veteran's Affairs, and the Secretary (then Togo D. West, Jr.). In her Complaint, she charged (1) all of the Defendants with having violated her statutory rights under 38 U.S.C. §§ 7461-7463, and (2) Samson with having violated her constitutional rights to due process as protected by the Fifth Amendment of the U.S. Constitution. Four months later, on October 10, 2000, Fligiel filed an Amended Complaint, in which she also charged each of the Defendants with having subjected her to acts of unlawful gender discrimination, in violation of Title VII of the Civil Rights Act of 1964.

Following the filing of dispositive motions by the parties for relief under Fed. R. Civ. P. 12(b)(1), 12(b)(6) and 56, the Court entered an Order on January 31, 2002, in which it (1) denied Fligiel's request for a partial summary judgment, and (2) granted the Defendants' petition to dismiss her claims, which had raised violations of her basic rights to statutory due

process protections under the United States Code and continued employment, as guaranteed by the Fifth Amendment of the Constitution. Significantly, the Court determined, among other things, that Fligiel's constitutional claims were barred as a result of sovereign immunity. Order, January 31,2001 at 9. However, inasmuch as Fligiel had amended her Complaint to assert that she had been subjected to unlawful acts of gender discrimination, this claim remained viable and her suit was not dismissed in its entirety.

On May 22, 2002, Fligiel filed a Second Amended Complaint in which she added a claim of retaliation against the Secretary, who is the only remaining Defendant.[1] In a Third Amended Complaint, which was filed by Fligiel on October 10, 2002, she reasserted her statutory claim in light of some factual developments that had occurred subsequent to its dismissal by the Court.

Fligiel's claims of gender discrimination and retaliation, which were tried before a jury, resulted in a verdict in favor of the Secretary on April 8, 2003. Following the jury trial, the parties jointly agreed that her claim of a statutory due process violation should be determined by the Court. On May 30, 2003, she filed a request pursuant to Rule 54(b) in which she petitioned the Court to reverse its January 31st dismissal of her statutory claim. On August 26, 2003, the Court modified its earlier ruling, and concluded that the Secretary had violated Fligiel's rights to an advance notice and opportunity to be heard as provided by 38 U.S.C. §§ 7461-7463. However, Section 706 of Title 5 of the United States Code provides that, in evaluating an adverse agency action,

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[1] All of the other Defendants were dismissed pursuant to the Order of January 31, 2001.

the Court must review the record and "due account shall be taken of the rule of prejudicial error." In its application of this statute, the Court concluded that "the Secretary's failure to provide the due process protections, to which Fligiel was entitled, was a harmless error."

II

Fligiel filed the instant motion to alter or amend the Order of August 26, 2003, pursuant to Fed. R. Civ. P. 59(e), which provides that "[a]ny motion to alter or amend a judgment shall be filed no later than 10 days after entry of the judgment." Although this Rule does not provide a standard for the determination of whether a prior decision by the court should be altered or amended, it has generally been held that "there are three grounds for amending an earlier judgment: (1) to accommodate an intervening change in controlling law; (2) to account for new evidence not available at trial; or (3) to correct a clear error of law or prevent manifest injustice." *Pacific Ins. Co. v. American Nat. Fire Ins. Co.*, 148 F.3d 396, 403 (4th Cir. 1998); *General Truck Drivers, Chauffeurs, Warehousemen & Helpers, Local No. 957 v. Dayton Newspapers, Inc.*, 190 F.3d 434, 445 (6th Cir, 1999) (Clay, J., dissenting). *See* 11 Wright, et al., *Federal Practice and Procedure* § 2810.1, at 124-26 (2d ed. 1995). However, Rule 59(e) motions may not be used "to raise arguments which could have been raised prior to the issuance of the judgment," *Pacific Ins., Co., supra*, or "to enable a party to complete presenting his case after the court has ruled against him," *Frietsch v. Refco, Inc.*, 56 F.3d 825, 828 (7th Cir. 1995); 11 Wright *et al., supra* § 2810.1, at 127-28 ("The Rule 59(e) motion may not be used to relitigate old matters, or to raise arguments or present evidence that could have been raised prior to the entry of judgment."). Moreover, the "reconsideration of a judgment after its entry is an

extraordinary remedy which should be used sparingly." Wright et *al.*,*supra,* § 2810.1, at 124.

In *Sault Ste. Marie Tribe of Chippewa Indians v. Engler,* 146 F.3d 367, 374 (6th Cir. 1998), the Native American Indian Tribes filed a Rule 59(e) motion in which they asserted that the district court failed to recognize that the actions of the state had improperly transferred control over their exclusive right to operate certain casino games to the Michigan Gaming Control Board and the City of Detroit. The Court of Appeals for the Sixth Circuit (Sixth Circuit) put aside the issue of the correctness of this argument because the Tribes had failed to raise it in a timely manner. Thus, the court held that "[a] motion under Rule 59(e) is not an opportunity to re-argue a case." *See id.* (citing *FDIC v. World Univ. Inc.,* 978 F.2d 10, 16 (lst Cir. 1992)). Furthermore, quoting from *FDIC v. World Univ. Inc.*, the court noted that "Rule 59(e) motions are aimed at reconsideration, not initial consideration. Thus, parties should not use them to raise arguments which could, and should, have been made before judgment issued. Motions under Rule 59(e) must either clearly establish a manifest error of law or must present newly discovered evidence." *Id.* On this basis, the Sixth Circuit decided that inasmuch as the Tribes "could have, but did not, raise their argument before the district court ruled on the motion to compel compliance, the argument is barred." *Id.*

III

In her motion, Fligiel contends that the Secretary's failure to afford her due process was a violation of constitutional due process as protected by the Fifth Amendment. In her pursuit of this issue, she submits that a violation of constitutional due process cannot be subjected to a harmless error analysis. Putting aside any substantive merit that Fligiel's arguments

may have, the Court determines that her motion to alter or amend the judgmant pursuant to Rule 59(e) must be rejected on procedural grounds.

First, Fligiel's motion must be rejected because she failed to raise her constitutional argument in a timely manner. Although she initially pled a constitutional violation in her original Complaint, this claim, which had been made only against Samson in his individual capacity, was dismissed on January 31, 2001. In her Third Amended Complaint, which was filed on October 10, 2002, Fligiel reasserted her claim of a statutory violation, but declined to renew her constitutional claim. In addition, she failed to assert these constitutional arguments in the parties' joint final pretrial order, which was filed on March 18, 2003, or in her trial brief, which was submitted on March 24, 2003. Moreover, she did not raise the constitutional claim in her post-trial motion, whereby she petitioned the Court to reverse its January 31st decision with regard to her statutory due process claim.

Second, the Court must deny Fligiel's Rule 59(e) request because it exceeds the scope of the August 26th decision, which only concluded that the Secretary had violated her statutory rights under Title 38. The Court did not determine that her constitutional rights had been violated. Furthermore, in its January 2001 Order, the Court had determined that Fligiel's constitutional claims were barred by the doctrine of sovereign immunity. This determination has never been modified or altered by any subsequent Order in this case, and as such, remains the law of this case.

IV

Accordingly, inasmuch as (1) Fligiel failed to make her constitutional arguments in a timely manner, and (2) the

constitutional issue was not before the Court at the time of its August 26, 2003, decision, her motion to alter or amend the judgment pursuant to Rule 59(e) must be denied.

IT IS SO ORDERED.

/s/
JULIAN ABELE COOK, JR.
United States District Judge

DATED: Feb 10 2004

APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

No. 00-72512

[Filed August 26, 2003]

SUZANNE FLIGIEL, M.D.,	)
	)
Plaintiff,	)
	)
ANTHONY J. PRINCIPI, in his capacity as the Secretary of Veteran Affairs,	)
	)
Defendant.	)
	)

ORDER

On June 2, 2000, the Plaintiff, Suzanne Fligiel, M.D., filed a Complaint in which she charged the Defendant, the Secretary of Veteran Affairs (Secretary), with, among other things, having (1) violated her statutory due process rights under 38 U.S.C. §§ 7461-7463, and (2) subjected her to acts of unlawful gender discrimination in violation of Title VII. On January 31, 2001, the Court granted the Secretary's motion, in which he had sought to obtain the dismissal of Fligiel's due process claim. Fligiel's remaining claims were subsequently submitted to a jury which found in the Secretary's favor on

April 8, 2003. Following the entry of the verdict, she filed a motion pursuant to Fed. R. Civ. P. 54, seeking a reversal of the January 31, 2001 decision in light of the factual and evidentiary record that had developed subsequent to the entry of the challenged decision.

For the reasons that have been set forth below, the Court will deny Fligiel's request.

I

Beginning in 1991, Fligiel served as the Chief of Pathology and Laboratory Medicine Services (PALMS) at the John D. Dingell Veterans Administration Medical Center in Detroit, Michigan (Detroit VA). However, on October 20, 1999, her employment status changed when she was given two memoranda by Dr. Michael Samson, the Chief of Staff of the Detroit VA, who was her superior during all of the times that are relevant to this proceeding.

In the first memorandum, Fligiel was advised that she would be "detailed" from the Detroit VA to work in the Veterans Administration Medical Center in Ann Arbor, Michigan (Ann Arbor VA). In the second memorandum, Fligiel was informed that she would (1) be reassigned from her position as Chief of PALMS to a staff physician status within the Department, and (2) lose her administrative responsibility pay, which amounted to a net loss of approximately $13,400. Samson declined Fligiel's request for an explanation regarding these administrative decisions. Moreover, she was neither provided with any advance notice of these personnel decisions, nor given an opportunity to answer the charges.

On November 4, 1999, Fligiel forwarded a letter to Samson, to whom she made a request for information which had formed the basis of his administrative decisions. On November 12, 1999, Fligiel filed a request for an appeal to the Disciplinary Appeals Board (DAB), complaining, in essence, that (1) Samson had not provided her with any specific information which would identify the reasons for his actions, and (2) she was entitled to receive an advance written notice, as well as a reasonable period of time in which to respond.

On January 4, 2000, Samson advised Fligiel that (1) he had rescinded his memorandum of October 20th, which reassigned her to a staff physician status, (2) she would retain her position as the Chief of PALMS at the Detroit VA, (3) her overall pay would not change, and (4) her placement on "detail" to the Ann Arbor VA would remain in effect.

Several days later (January 11, 2000), the Office of Regional Counsel for the Veterans Health Administration (VHA) notified Fligiel that it had determined that the action taken against her was neither a *major adverse* action nor did it entail a question of professional conduct or competence. Thus, it was the position of the VHA that she was not entitled under the law to receive a hearing or a fight of appeal before a DAB.

Following the completion of her "detail" to Ann Arbor, Fligiel was notified that she would be permanently reassigned to the Aleda E. Lutz VA Medical Center in Saginaw, Michigan (Saginaw VA). This reassignment directive was opposed by Fligiel who, in an effort to block its implementation, filed a grievance letter with the VHA. However, her request was rejected on October 31, 2001.

II

In her motion, Fligiel asserts that the Court should reverse its January 2001 dismissal of her due process claim because the bases for this decision had been severely weakened by subsequent events and by the testimony which has been presented during the trial. In particular, Fligiel contends that (1) her reassignment to the Saginaw VA, and (2) Samson's admission that it was never his intention to bring her back to the Detroit VA, demonstrate the validity of her claim in this litigation; namely, that the VHA wrongfully characterized her assignment to the Ann Arbor VA as a "detail." As such, she asks the Court, inter alia, to reinstate her as Chief of PALMS at the Detroit VA. In its opposition papers, the Secretary asserts that (1) this Court does not have jurisdiction over Fligiel's statutory claim, (2) she is not entitled to have her case reviewed by a DAB, and (3) upon review, her relief, if any, would be limited to granting her the right to appeal the VHA's decision to a DAB.

III

This case is governed by 38 U.S.C.§ 7461, which provides, in relevant part, that "[w]henever the Under Secretary for Health... brings charges based on conduct or performance against [an employee] and as a result of those charges an adverse personnel action is taken against the employee, the employee shall have a right to appeal the action." This statute also states that "[i]f the case involves or includes a question of professional conduct or competence in which a major adverse action was taken, such an appeal shall be made to a Disability Appeals Board under section 7462 of this title." 38 U.S.C. § 7461(b)(1). However, in any other case, "such an appeal shall be made ... through Department

grievance procedures under section 7463 of this title." 38 U.S.C. § 7461(b)(2)(A).

Thus, pursuant to this statute, the conduct of Fligiel's appeal depends upon whether (1) she suffered a *major adverse* action, and (2) her case involved a question of professional conduct or competence. Section 7461(c)(2) defines a *major adverse* action as "an adverse action which includes any of the following: (A) Suspension, (B) Transfer, (C) Reduction in grade, (D) Reduction in basic pay, [or] (E) Discharge." The statute also states that a question of professional conduct or competence is "a question involving any of the following: (A) Direct patient care, [or] (B) Clinical competence." 38 U.S.C. § 7461 (c)(3).

Fligiel contends that Samson's disciplinary actions against her satisfy the statutory definition of a *major adverse* action and involve a question of professional conduct or competence. The Secretary disagrees. It is his view that Fligiel's reassignment to the Ann Arbor VA was only a "detail," which is neither punitive nor can it be classified as a *major adverse* action.

However, the Secretary's representation of Fligiel's assignment to Ann Arbor as only a "detail" does not comport with the current record of this case. In describing a "detail," VHA Directive 5111 provides that, "[e]mployees may be detailed when it is more practical than any other type of regular personnel action." Pl.'s Post-trial Br. at Exh. 8. This VHA Directive also defines a "detail" as "the temporary assignment of an employee to a different set of duties for a specified period of time. There is no formal position change; officially, employees continue to hold the position from which they were detailed and keep the same status and pay." *Id.* Finally, the VHA Directive 5111 defines a "transfer" as "the

movement of an employee from one facility to another for performance or conduct reasons pursuant to 38 U.S.C. 7461." *Id.*

In this case, a "transfer," which is classified as a *major adverse* action under the applicable statute, more aptly describes the personnel actions that have been challenged by Fligiel. Although most of the adverse aspects in Samson's memoranda of October 20th (i.e., her (a)"detail" to the Ann Arbor VA, (b) reassignment to a staff position, and (c) reduction in pay) were overturned by his January 4, 2000 memorandum to Fligiel, they nonetheless indicate that the purpose of the "detail" placement was more than a temporary assignment.

It should also be noted that Samson hired Richard VanderHeide in February 2000 to serve as the Chief of PALMS at the Detroit VA, even though Fligiel officially still held that position. At the conclusion of her "detail" in October 2001, Fligiel was permanently transferred to the Saginaw VA. During the cross examination of Samson during the trial, the following exchange occurred:

Fligiel's attorney:	"You knew that she was not going to be just temporarily removed from her duties at Chief at the Detroit VA. You knew that she was never coming back to that position, right?"
Samson:	"I would say, yes, at that point."

Pl.'s Post-trial Br. at Exh, 6.

In *Neal v. Walters,* 750 F.2d 347 (5th Cir.1984), the United States Court of Appeals for the Fifth Circuit held that the reassignment of an employee is not a *major adverse* action if (1) it does not incorporate a reduction in position and salary and (2) the personnel decision was not a disciplinary act. However, the *Neal* Court made clear that "[t]he Veterans Administration may not evade the statutory due process requirements by the pretext of articulating a non-disciplinary reason for a proposed employment action." *Id.* at 350. Based upon the development of the record in this case and events that have transpired since the entry of the January 31, 2000 Order, the Court finds that its previous determination, in which it concluded that Fligiel had not suffered a *major adverse* action, must be set aside. It is now clear that the Secretary's representation of Fligiel's assignment as a "detail" was only a pretext for disciplinary action. Moreover, the Court concludes that the administrative actions taken against Fligiel should have been described as a "transfer," which, in turn, would constitute a *major adverse* action pursuant to 38 U.S.C. § 7461.

The Court, however, reaches a different conclusion with regard to the second requirement of the statute. In so doing, the Court finds that the personnel actions against Fligiel do not involve issues which relate to Fligiel's professional conduct or competence. According to the statute, the only matters involving questions of professional conduct or competence are those issues which pertain to "direct patient care" or "clinical competence."

In her motion, Fligiel asserts that the decision to transfer her to Ann Arbor involved direct patient care. In support of this contention, she points to Samson's trial testimony in which he spoke of his concerns about patient care as a result of the administrative and supervisory problems in PALMS at

the Detroit VA. However, these comments by Samson about patient care do not adequately overcome the overwhelming evidence that was presented during the trial which addressed the reasons for her transfer. The overwhelming evidence established that Fligiel was transferred to Ann Arbor because of her deficiency in administrative and supervisory skills. It was the collective and virtually unanimous opinions of those witnesses who were called upon to testify on behalf of the Secretary that Fligiel had been unsuccessful in building strong and productive working relationships with her colleagues, the employees who were under her supervision at the Detroit VA, and the professional staff at the nearby Wayne State University School of Medicine. These administrative deficiencies cannot be fairly described as matters involving direct patient care.

Therefore, Fligiel has failed to satisfy the minimal requirements of 38 U.S.C. § 7461, which would have entitled her to an appeal under 38 U.S.C. § 7462. Instead, Fligiel's case, which does involve a *major adverse* action, is governed by 38 U.S.C. § 7463.

IV

Before evaluating the VHA's compliance with § 7463, the Court must first address an assertion by the Secretary that this Court lacks jurisdiction over Fligiel's due process claim under the Administrative Procedures Act.[1]

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[1] Fligiel asserts that the Court has the authority to review the actions of the VHA pursuant to the Administrative Procedures Act, 5 U.S.C. §§ 701-706.

In support of this challenge, the Secretary relies heavily upon *United States v. Fausto,* 484 U.S. 439 (1988) and *Pathak v. Department of Veterans Affairs,* 274 F.3d 28 (lst Cir. 2001). In *Pathak,* the court observed that "*Fausto* stands for the general proposition that judicial review is unavailable to a federal employee who has suffered an adverse personnel action if [the Civil Service Reform Act (CSRA)] does not provide judicial review." *Pathak,* 274 F.3d at 31. Furthermore, the *Pathak* Court noted that "[b]ecause CSRA does not provide Pathak with a right to judicial review, the logic of *Fausto* dictates that he cannot go around CSRA and assert federal jurisdiction by relying upon the Administrative Procedure Act." *Id.* at 32. Pathak was a physician who had been appointed to the VHA under 38 U.S.C. § 7401(1), and received adverse disciplinary decisions, all of which were governed by 38 U.S.C. §§ 7461 et seq.

However, *Pathak and Fausto* are inapposite to the present case because the affected employees in those two cases had sought to obtain judicial review after they had exhausted their administrative procedures. Neither Pathak nor Fausto complained that the employers had violated their due process rights relating to their efforts to appeal the adverse employment decisions against them. Indeed, these two grievants had received (1) notice of the proposed disciplinary actions prior to those actions becoming effective, and (2) an opportunity to answer the charges against them. In the present case, Samson improperly characterized his decision to transfer Fligiel as a nondisciplinary "detail" and, as a consequence, did not afford Fligiel with any advance notice of the charges against her or an opportunity to answer those charges. Thus, the Court concludes that those cases, which have been cited by the Secretary in support of his argument, are inapplicable to and do not govern the resolution of the case at bar.

Pursuant to § 7463(c)(1) and inasmuch as Samson's charges against Fligiel could have resulted in a *major adverse* action (and although her case did not involve professional conduct or competence), Fligiel was entitled to have received the same notice and opportunity to answer as provided in subparagraphs (A) and (B) of § 7462(b)(1). According to those provisions, Fligiel was entitled to, among other things, (1) "[a]t least 30 days advance written notice... specifically stating the basis of each charge, [and] the adverse actions that could be taken if the charges are sustained," and (2) "[a] reasonable time, but not less than seven days, to present an answer orally and in writing ... and to submit affidavits and other documentary evidence in support of the answer."[2] It is therefore clear from the record of this case that the VHA failed to honor Fligiel's statutory due process rights to an advance notice and an opportunity to respond.

V

As a remedy for the violation of her due process rights, Fligiel asks the Court to reinstate her to her former position of Chief of PALMS at the Detroit VA. However, under the circumstances of this case, the Court has determined that such a remedy is unwarranted. The Court finds that the Secretary's failure to provide the due process protections, to which Fligiel was entitled, was a harmless error.

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[2] Even in those cases which involve neither a *major adverse* action nor professional conduct or competence, § 7463(c)(2) provides that "the employee is entitled to (A) an advance written notice stating the specific reason for the proposed action, and (B) a reasonable time to answer orally and in writing and to furnish affidavits and other documentary evidence in support of the answer."

Section 706 of Title 5 of the United States Code provides, in pertinent part, that the Court, in evaluating an adverse agency action, should review the record and that "due account shall be taken of the rule of prejudicial error." 5 U.S.C. § 706.

Here, the VHA incorrectly described Fligiel's transfer as a "detail." In so doing, the agency failed to conform with the statutory requirements of providing her with an advance written notice of the charges against her, as well as an opportunity to answer those charges. However, the record of this case and the testimony at trial provided overwhelming evidence that Fligiel was transferred and later reassigned because she either refused or was unable to perform the administrative and supervisory tasks of her position as Chief in a satisfactory manner. During the trial, Fligiel complained that the decision to transfer her was, at least in part, motivated by her gender. The jury thought otherwise and returned a verdict in favor of the Secretary, which further confirms the conclusion of the Court that her transfer was prompted by her deficiencies as an administrator and supervisor.

Even if the Secretary had provided Fligiel with a written notice in accordance with the statute, and had given her a reasonable period of time in which to answer the charges, there is absolutely no indication or suggestion in this record that the VHA would have modified its original decision to place her in some VA facility other than Detroit. Fligiel's gender discrimination claim was rejected by the jury, and she has failed to identify any other pertinent evidence from which this Court could conclude that the Secretary would have reversed his initial decision to transfer her to the Ann Arbor VA. As such and under the circumstances in this case, the

failure by the VHA to comply with the applicable statute has resulted in harmless error.

Accordingly, the Court must deny Fligiel's request to set aside the Order of January 31, 2001, in which the Secretary was granted a summary judgment.

IT IS SO ORDERED.

/s/
JULIAN ABELE COOK, JR.
United States District Judge

APPENDIX F

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

No. 00-CV-72512

[Filed August 26, 2003]

SUZANNE FLIGIEL, M.D., Plaintiff,	)
v.	)
ANTHONY J, PRINCIPI, in his capacity as Secretary, Department of Veterans Affairs, Defendant.	)

JUDGMENT IN A CIVIL CASE

Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

IT IS ORDERED AND ADJUDGED that Judgment is entered in favor of Defendant, Anthony, Principi, in his capacity as Secretary, Department of Veterans Affairs, and against Plaintiff Suzanne Fligiel, M.D.

David Weaver, Clerk of Court

/s/ _____

Deputy Clerk

APPENDIX G

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case number 00-72512

[Filed October 21, 2002]

SUZANNE FLIGIEL, M.D.,	)
	)
Plaintiff,	)
	)
v.	)
	)
ANTHONY J. PRINCIPI, in his capacity as the Secretary of Veteran Affairs,	)
	)
Defendant.	)
	)

ORDER

On September 25, 2002, the Plaintiff, Dr. Suzanne Fligiel, filed a motion in which she asked the Court to authorize the amendment of her Complaint for the third time. In support of her motion, Fligiel contends, among other things, that (1) on October 11, 2001, she was reassigned by the Department of Veterans Affairs from her position in Ann Arbor, Michigan as the Chief of Pathology to a Staff Physician position in Saginaw, (2) the current reassignment

follows an earlier "detail" in which she was transferred from Detroit to Ann Arbor, (3) the most recent reassignment has stripped her of all supervisory responsibilities, and (4) in carrying out this reassignment, the Department violated the protections that are afforded to her under 38 U.S.C. §§ 7461-7464.

The Defendant, Secretary of Veterans Affairs, filed a response,[1] contending that (1) Fligiel was reassigned to Saginaw because the two-year term of her detail in Ann Arbor had ended, (2) there was a need for a pathologist in Saginaw, and (3) her permanent reassignment from Detroit to Saginaw did not involve issues of professional conduct or competency which would have entitled her to a hearing before the Disciplinary Appeals Board.

Rule 15(a) of the Federal Rules of Civil Procedure provides that leave to amend a pleading "shall be freely given when justice so requires." Fed. R. Civ. P. 15(a). Therefore, "[i]f the underlying facts or circumstances relied upon by a

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[1] The Defendant, Secretary of Veterans Affairs, filed his response to this motion in violation of Rule 7.1 (d) of the Local Rules of the United State District Court for the Eastern District of Michigan. *See* LR 7.1(d)(2)(B) ("A response to a nondispositive motion must be filed within 14 days after services of the motion"). According to the records in this cause, it appears that the Defendant filed his response on October 15, 2002. Despite being empowered to strike this response as a form of a sanction, the Court believes that such a remedy would be unjust and too harsh. Moreover, the failure of the Defendant to respond in a timely manner does not appear to have cause Fligiel to suffer any prejudice on this narrow issue. Accordingly, the Court will evaluate the Defendant's response as if it had been timely filed in accordance with the Local Rules of the Court. No costs will be assessed.

plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits." *Foman v. Davis,* 371 U.S. 178, 182 (1962); *Tefft v. Seward,* 689 F.2d 637, 639 (6th Cir. 1982) (Rule 15 "reinforce[s] the principle that cases should be tried on their merits rather than on the technicalities of pleadings"). Decisions as to whether the ends of justice require leave to amend are left to the sound discretion of the trial judge. *Miller v. Metropolitan Life Ins. Co.,* 925 F.2d 979, 983 (6th Cir. 1991).

Although there is a general presumption by the courts to favor a petition to amend, such a request may be denied if there is evidence of (1) an undue delay, (2) bad faith on the part of the movant, (3) repeated failure to cure deficiencies by previous amendments, or (4) prejudice suffered by the opposition. *Foman,* 371 U.S. at 182; *Brooks v. Celeste,* 39 F.3d 125, 130 (6th Cir. 1994). Additionally, an application for leave to amend may be denied if there is evidence that an amendment would be futile because it could not withstand a motion to dismiss. *Thiokol Corp. v. Dep't of Treasury,* 987 F.2d 376, 383 (6th Cir. 1993); *see Foman,* 371 U.S. at 182. As such, motions to amend brought pursuant to Rule 15 are not universally granted. *Sobel v. Yeshiva Univ.*, 477 F. Supp. 1161, 1168 (S.D.N.Y. 1979). However, delay alone, in the absence of prejudice or an intent to harass, is not a justifiable basis upon which to deny a request for leave to amend a pleading. *Security Ins. Co. of Hartford v. Kevin Tucker & Assoc., Inc.,* 64 F.3d 1001, 1009 (6th Cir. 1955); *Hageman v. Signal L.P. Gas, Inc.,* 486 F.2d 479, 484 (6th Cir. 1973). By the same token, repeated failure to cure deficiencies by amendment despite the opportunity to do so constitutes a sufficient basis on which to deny a request for leave to amend. *United States v. Berman,* 884 F.2d 916, 921 (6th Cir. 1989).

The proposed amendment in the instant case appears only to add an additional legal theory arising out of the same set of facts that are currently at issue in the case. There is no indication that the amendment would cause any undue prejudice to the Defendant, or that Fligiel has acted in bad faith. Moreover, the Court believes that it is in the interest of justice to grant Fligiel's motion.

Accordingly, Fligiel's motion for leave to file a third amended complaint is granted.

IT IS SO ORDERED.

/s/
JULIAN ABELE COOK, JR.
United States District Judge

DATED: OCT 21 2002
Detroit, Michigan

APPENDIX H

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case number 00-72512

[Filed January 31, 2001]

SUZANNE FLIGIEL,	)
	)
Plaintiff,	)
	)
v.	)
	)
MICHAEL SAMSON. et al.,	)
	)
Defendants.	)
	)

ORDER

On September 5, 2000, the Defendants, Michael K. Samson ("Samson"), Thomas L. Garthwaite ("Garthwaite"), Togo D. West, Jr. ("West"), and the Department of Veterans Affairs ("the Department"), filed a motion, in which they collectively asked the Court to dismiss all of the claims that had been filed against them in this law suit by the Plaintiff, Suzanne Fligiel. On September 29, 2000, Fligiel filed a motion for the entry of a partial summary judgment, contending that the Defendants violated her constitutional

rights when she was wrongfully reassigned and demoted to an Ann Arbor work station.[1]

Contending that they are entitled to dispositive relief under Fed. R. Cir. P. 12(b)(1), 12(b)(6) or 56, the Defendants assert that Fligiel has no right to a judicial review under 38 U.S.C. §§ 7461-7474, because her reassignment to an office in Ann Arbor was not the result of any claimed professional misconduct or incompetence which would justify the invocation of the appellate jurisdiction of the Disciplinary Appeals Board ("DAB"). Moreover, each of them submit that (1) Fligiel, despite having been afforded all of the requisite due process protections by the grievance procedures under 38 U.S.C. § 7463, failed to avail herself of these rights, and, (2) all of her 5th Amendment claims against them are barred by sovereign and qualified immunity.

In her motion, Fligiel asserts that (1) the Defendants failed to comply with, among other things, the notice and hearing requirements of 38 U.S.C. §§ 7461-7474 and (2) they, as a direct result of their unjustified conduct, have deprived her of property and liberty interests within the meaning of the Fifth Amendment to the United States Constitution.

I.

On June 2, 2000, Fligiel filed a Complaint in which she sought relief against the Defendants for their (1) violation of her statutory due process rights under 38 U.S.C. §§ 7461-7464 and the United States Constitution, and (2) acts of

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[1] The Court heard oral arguments on these motions on November 20, 2000.

gender discrimination, in violation of Title VII.[2] Fligiel asserts that her supervisor, Michael K. Samson, informed her on October 20, 1999, that she would be removed from her position as Chief of Pathology and Laboratory Medical Services at the John D. Dingell VA Medical Center in Detroit and reassigned to the Ann Arbor VA Medical Center as a staff pathologist. (Compl. ¶¶11-14.) According to Fligiel, when he was asked for an explanation for the removal and reassignment, Samson "compared her to Adolph Hitler and stated that she ran her Department like a concentration camp." (Compl. ¶13.)

Thereafter, Fligiel made several attempts to contact the Defendants regarding her grievance rights, all of which were unsuccessful. On November 12, 1999, she filed an appeal with Thomas L. Garthwaite, Acting Secretary for Health of the Department of Veterans Affairs, from whom she requested a hearing before the DAB pursuant to 38 U.S.C. § 7462. *Id.* at ¶19. However, approximately four weeks later (December 10, 1999), her request for a hearing was denied. *Id.* at ¶20.

In their motion, the Defendants ask this Court to dismiss Fligiel's claims for (1) lack of subject matter jurisdiction pursuant to Rule 12(b)(1) and (2) failure to state a claim under Rule 12 (b)(6).[3] The test for dismissal for want of subject

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[2] On October 10, 2000, the Court authorized Fligiel to amend her Complaint to include a claim for gender discrimination pursuant to Title VII. It should be noted that the motions before the Court do not address Fligiel's claim for gender discrimination. Hence, this Order does not discuss this claim.

[3] In a literal sense, the instant motion for dismissal pursuant to Federal Rule of Civil Procedure 12(b)(1) is an appropriate vehicle with which to raise an issue, in that the statute in question only

matter jurisdiction on the basis of Rule 12(b)(1) is stringent, and courts are reluctant to dismiss a case on the face of the complaint. *Suthoff v. Yazoo County Industrial Dev. Corp.*, 637 F.2d 337, 338 (5th Cir. 1981). The court will only refuse to entertain a suit for want of jurisdiction where the federal question "clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous." *Bell v. Hood,* 327 U.S. 678, 681-82 (1946).

In the instant case, it is clear that the allegations in the Complaint are drawn by Fligiel in order to seek recovery under the United States Constitution and a federal statute, both of which grant subject matter jurisdiction to the Court in this controversy. As such, the Defendants' Motion will be treated here as one which seeks relief for Fligiel's alleged failure to state a claim pursuant to Rule 12(b)(6). This Rule expressly provides that if the motion in question is accompanied by, and the Court considers, evidentiary materials outside of the pleadings, the request shall be converted into one for a summary judgment under Rule 56.

In assessing motions that have been filed under Federal Rule of Civil Procedure 56, the Court must examine any pleadings, depositions, answers to interrogatories, admissions, and affidavits in a light that is must favorable to the non-moving party. Fed. R. Civ. P. 56(c); See *United States v. Diebold, Inc.,* 369 U.S. 654, 655 (1962): *Boyd v. Ford Motor Co.,* 948 F.2d 283, 285 (6th Cir. 1991); *Bender v. Southland Corp.,* 749 F.2d 1205, 1210-11 (6th Cir. 1984).

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provides for judicial review in very limited circumstances. Nevertheless, the Court will review the Defendants' request for relief pursuant to Rules 12(b)(6) and 56 in light of its reluctance to deprive Fligiel of her day in court.

The moving party has the burden of demonstrating that there is no genuine issue as to any material fact, and a summary judgment is to be entered if the evidence is such that a reasonable jury could find only for the moving party.[4] *See, Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

When a summary judgment motion is predicated on a factual issue and is adequately supported, the non-moving party must take some affirmative action to avoid the entry of a summary judgment. Fed. R. Civ. P. 56(e). The mere existence of a scintilla of supporting evidence is insufficient. *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1477 (6th Cir. 1989).

III.

In Count I of her Complaint, Fligiel alleges that the "removal and replacement from her Chief position, transfer...to a staff position at the Ann Arbor VA Medical Center, and revocation of...staff privileges" constituted a major adverse action within the meaning of 38 U.S.C. § 7461 (c)(2). (Compl. ¶31.) In addition, she claims that the Defendants' actions were based on issues relating to her "professional conduct and competence" within the meaning of 38 U.S.C. § 7461 (c)(3). *Id.* at ¶32. As a result Fligiel contends that she was entitled to: (1) receive notice of the charges against her (38 U.S.C. § 7462(b)(3)(A), 7463(c)); (2) time in which to respond to the notice (38 U.S.C. § 7462(b)(1)(B)); and, (3) a hearing before the DAB (38 U.S.C. § 7462(a), (c)). The Defendants reject this contention,

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[4] [T]here is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." *Anderson*, 477 U.S. at 250.

arguing instead that Fligiel's reassignment did not constitute a major adverse action and was unrelated to her professional conduct or competence as defined in the statute. Thus, it is their position that they were not required to provide her with formal notice or a hearing before the DAB. (Def.'s Mot. Supp. Summ. J. at 3-4.)

Section 7461 states in relevant part:

(a) Whenever the Chief Medical Director (or an official designated by the Chief Medical Director) brings charges based on conduct or performance against a section 7401(1) employee and as a result of those charges an adverse personnel action is taken against the employee, the employee shall have the tight to appeal the action.

(b)(1) If the case involves or includes a question of professional conduct or competence in which a major adverse action was taken, such an appeal shall be made to a Disciplinary Appeal Board under section 7462 of the title.

(2) In any other case, such and appeal should be made–

(A) Through Department grievance procedures under section 7463 of this title, in any case that involves or includes a question of professional conduct or competence in which a major averse action was not taken or in any case of an employee who is not covered by a collective bargaining agreement under chapter 71 of title 5.

(c) For purposes of this subchapter-

(1) Section 7401(1) employees are employees of the Department employed on a full-time basis under a permanent appointment in a position listed in section 7401(1) of this title (other than interns and residents appointed pursuant to section 7406 of this title).
(2) A major adverse action is an adverse action which includes any of the tbllowing:
(A) Suspension.
(B) Transfer.
(C) Reduction in grade.
(D) Reduction in basic pay.
(E) Discharge.
(3) A question of professional conduct or competence is a question involving any of the following:
(A) Direct patient care.
(B) Clinical competence.

(d) An issue of whether a matter or question concerns, or arises out of professional conduct or competence is not itself subject to any grievance procedure provided by law, regulation, or collective bargaining agreement and may not be reviewed by any other agency.

A reassignment of an employee without a material reduction in rank or salary, and/or proof that the reassignment was disciplinary in nature, is not a major adverse action which would entitle the affected employee to a disciplinary hearing under the statute. *Neal v. Walters,* 750 F.2d 347, 348 (5th Cir. 1984) (determination by district court under 38 U.S.C. § 4110, as amended 38 U.S.C. § 7462. that physician, who had been reassiged without reduciion in rank or salary under circumstances that were not clearly disciplinary in nature, was not entitled to hearing before disciplinary board). Further, in reviewing the meaning of "professional competence and conduct," as outlined in section 7461, this term relates to an

employee's proficiency and competence and does not address more "generic sorts of misconduct." *Gergans v. Brown*, 911 F. Supp. 308, 312 (N.D. Ill. 1995). Since Fligiel's reassignment did not include a reduction in rank or salary and was not clearly disciplinary, in nature, it did not rise to the level of a major adverse action under section 7461 which would invoke the jurisdiction of the DAB. Similarly, her reassignment did not involve a matter of professionalism, in that it was not related to her competence or proficiency as a medical practitioner but, at best, to her administrative abilities.[5] Thus, inasmuch as Fligiel's reassignment to the VA Medical Center in Ann Arbor neither constituted a major adverse action nor invohed a question of professional conduct or competence within the meaning of 38 U.S.C. section 7461, the decision by the DAB was warranted.[6]

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[5] While the Court is satisfied that its determination in the instant action is justified in light of the current record, it is compelled to reiterate the dicta in *Neal v. Walters*, 750 F.2d 347 (5th Cir. 1984). wherein the Fifth Circuit Court of Appeals made it clear that "(t)he Veterans Administration may not evade the statutory due process requirements by the pretext of articulating a non-disciplinary reason for a proposed employment action. *Id* at 350.

[6] It should be noted that section 7461 only provides a remedy in those instances where *formal charges* are brought against a section 7401(1) employee. (emphasis added). However, there were no such formal charges brought against Fligiel in the case at bar. As such, she is left with the remedies in section 7463. Specifically, section 7463(a) provides that "the Secretary, shall prescribe procedures for the consideration of grievances...arising from adverse personnel actions in which each action taken either is not a major adverse action or does not arise out of a question of professional conduct or competence." 38 U.S.C. § 7463(a). The applicable regulations in this case are those in the Department of Veterans Affairs Manual. MP-5. Part I (December 31, 1998). These regulations provide that

an employee who has a work related grievance must first seek an informal adjustment through the informal grievance procedure. *Id* at 8B-4. This procedure sets forth the requisite time frame for the filing of grievances. Fligiel also makes the argument that pursuant to 38 U.S.C. § 7463(c), she was entitled to an advance written notice of the charges against her. While this section does require that notice be given "in any case in which charges are brought against an...employee which could result in a major adverse action", there is no evidence in the case at bar that formal charges were filed against her. Hence, she is not entitled to notice under section 7463(c)(1).

Fligiel also contends that the language in section 7462 entitles her to judicial review under the APA §§ 500-706. Specifically, she asserts that her unsuccessful efforts to seek a hearing before the DAB, when coupled with the Department's denial of this request, constituted a final agency action which is subject to a judicial review under the APA. This claim is without merit. Under section 7462(f)(1) and (2), judicial review is warranted only when, "a section 7401 (1) employee [is] adversely affected by a final order or decision of a Disciplinary, Appeals Board (as reviewed by the Secretary)..." 38 U.S.C. § 7462(f)(1). In the instant case, Fligiel did not receive a final order or decision by the DAB and as such, she is not entitled to judicial review under section 7462. Further, in the event that the Department's refusal to submit Fligiel's appeal to the DAB for a hearing was determined to be a final agency decision subject to judicial review under section 701 *et seq.* of the APA, it is unlikely, given the deference afforded by courts to agency actions, that, Fligiel's reassignment would rise to the standard of "arbitrary, and capricious." *See Motor Vehicle Mfrs. Ass'n of U.S., Inc., v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983): *see also Bowman Transp. Inc., v. Arkansas-Best Freight System*, 419 U.S. 281, 285 (1974) (for a more complete discussion of the standard of review as it relates to a finding that an agency action is arbitrary and capricious). Finally, in light of the fact that neither of the parties makes an argument as to the whether the agency's actions in the instant case were arbitrary and

VI.

In Count II of the Complaint, Fligiel avers that she had a property interest in her continued employment which was protected by the Fifth Amendment of the U.S. Constitution, pursuant to *Bivens v. Six Unknown Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1982). The administrative remedial procedures in Title 38 and VA regulations bar a Bivens type action. *Gregor v. Derwinski*, 911 F. Supp. 643, 646 (W.D.N.Y. 1996); *See also Jones v. Tennessee Valley Authority*, 948 F.2d 258(6th Cir. 1991) (courts should not create *Bivens* remedies when design of government program suggests that Congess has provided adequate remedies for constitutional violations). In her *Bivens* claim, Fligiel does not dispute the existence of a comprehensive remedial scheme at the John D. Dingell VA Medical Center in Detroit during all times relevant to this controversy. However, she contends that the Defendants have "manipulated the system to prevent [her] from participating in any of the remedial statutory scheme." (Pl.'s Resp. to Mot. Summ. J. at 15-16.) This argument is unpersuasive for a number of reasons. Foremost among these is that there is sufficient evidence in the record to indicate that the Defendants provided her with relevant portions of the VA Manual relating to grievance procedures. (Pl.'s Ex. K.) Further. the record indicates that the Defendants provided Fligiel with contact names and telephone numbers in the event that she required additional information or had any questions concerning the administrative process. (Pl.'s Exs. C, D.)

In addition to being barred under *Bivens,* the merits of Fligiel's constitutional claims against Samson, Garthwaite and

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capricious it is not necessary for the Court to address this question in more detail.

West cannot be addressed by the Court because each of them are barred as a result of sovereign immunity. It is also well settled that the United States, as a sovereign, is immune from suit unless it has expressly waived such immunity. *Ecclesiastical Order of the Ism of Am. Inc. v. Chasin,* 845 F.2d 113. 115 (6th Cir. 1988). This immunity extends to those federal officers and officials who were acting in their official capacities during the times of the alleged misconduct. *Id.* Therefore, inasmuch as Fligiel's claims against the individual Defendants were brought against them in their official capacities, the doctrine of sovereign immunity must be applied.

Finally, Fligiel's constitutional claim against Samson as an individual must be rejected on the basis of his qualified immunity. Government officers, who perform discretionary functions, are entitled to qualified immunity from civil suits for damages arising out of the performance of their official duties. *Adams v. Metiva,* 31 F.3d 375, 385 (6th Cir. 1994). The key inquiry, in analyzing a claim of qualified immunity is whether the defendant's alleged conduct violated clearly established statutory or constitutional rights of which a reasonable person would have known. *Id.* The burden is on Fligiel to prove, through sufficient evidence, that the government official violated a clearly established constitutional right. *Id.*

In the case at bar, Fligiel maintains that Samson violated her right to due process when he (1) reassigned her to the Ann Arbor VA Medical Center without the required notice and (2) failed to give her an opportunity' to respond to the charges against her. It is reasonable to assume that Samson, who served as the Chief of Staff of the John D. Dingell Veterans Administration Medical Center at the time of this controversy, knew, or should have known, of the basic rights to which a

citizen is entitled under Title 38 and the U.S. Constitution. However, a review of the record reveals that Fligiel has failed to meet her burden in proving that Samson violated these fundamental rights of due process. Further, the Court is satisfied that Title 38 and the VA regulations contain a remedial scheme which is adequate to address any claimed constitutional violations.

Hence, the Defendants' request for an entry of a summary judgment is granted and Fligiel's request for similar relief is denied.

IT IS SO ORDERED.

/s/
JULIAN ABELE COOK JR.
United States District Judge

DATED: JAN 31 2001
Detroit, Michigan

APPENDIX I

5 U.S.C. § 701. Application; definitions

(a) This chapter applies, according to the provisions thereof, except to the extent that—

(1) statutes preclude judicial review; or

(2) agency action is committed to agency discretion by law.

(b) For the purpose of this chapter—

(1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include—

(A) the Congress;

(B) the courts of the United States;

(C) the governments of the territories or possessions of the United States;

(D) the government of the District of Columbia;

(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;

(F) courts martial and military commissions;

(G) military authority exercised in the field in time of war or in occupied territory; or

(H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; chapter 2 of title 41; subchapter II of chapter 471 of title 49; or sections 1884, 1891–1902, and former section 1641 (b)(2), of title 50, appendix; and

(2) "person", "rule", "order", "license", "sanction", "relief", and "agency action" have the meanings given them by section 551 of this title.

5 U.S.C. § 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

APPENDIX J

5 U.S.C. § 7511. Definitions; application

(a) For the purpose of this subchapter--

(1) "employee" means--

(A) an individual in the competitive service--

(i) who is not serving a probationary or trial period under an initial appointment; or

(ii) who has completed 1 year of current continuous service under other than a temporary appointment limited to 1 year or less;

(B) a preference eligible in the excepted service who has completed 1 year of current continuous service in the same or similar positions--

(i) in an Executive agency; or

(ii) in the United States Postal Service or Postal Rate Commission; and

(C) an individual in the excepted service (other than a preference eligible)--

(i) who is not serving a probationary or trial period under an initial appointment pending conversion to the competitive service; or

(ii) who has completed 2 years of current continuous service in the same or similar positions in an Executive agency under other than a temporary appointment limited to 2 years or less;

(2) "suspension" has the same meaning as set forth in section 7501(2) of this title;

(3) "grade" means a level of classification under a position classification system;

(4) "pay" means the rate of basic pay fixed by law or administrative action for the position held by an employee; and

(5) "furlough" means the placing of an employee in a temporary status without duties and pay because of lack of work or funds or other nondisciplinary reasons.

(b) This subchapter does not apply to an employee--

(1) whose appointment is made by and with the advice and consent of the Senate;

(2) whose position has been determined to be of a confidential, policy-determining, policy-making or policy-advocating character by--

(A) the President for a position that the President has excepted from the competitive service;

(B) the Office of Personnel Management for a position that the Office has excepted from the competitive service; or

(C) the President or the head of an agency for a position excepted from the competitive service by statute;

(3) whose appointment is made by the President;

(4) who is receiving an annuity from the Civil Service Retirement and Disability Fund, or the Foreign Service Retirement and Disability Fund, based on the service of such employee;

(5) who is described in section 8337(h)(1), relating to technicians in the National Guard;

(6) who is a member of the Foreign Service, as described in section 103 of the Foreign Service Act of 1980;

(7) whose position is within the Central Intelligence Agency or the General Accounting Office;

(8) whose position is within the United States Postal Service, the Postal Rate Commission, the Panama Canal Commission, the Tennessee Valley Authority, the Federal Bureau of Investigation, an intelligence component of the Department of Defense (as defined in section 1614 of title

10), or an intelligence activity of a military department covered under subchapter I of chapter 83 of title 10, unless subsection (a)(1)(B) of this section or section 1005(a) of title 39 is the basis for this subchapter's applicability;

(9) who is described in section 5102(c)(11) of this title; or

(10) who holds a position within the Veterans Health Administration which has been excluded from the competitive service by or under a provision of title 38, unless such employee was appointed to such position under section 7401(3) of such title.

(c) The Office may provide for the application of this subchapter to any position or group of positions excepted from the competitive service by regulation of the Office which is not otherwise covered by this subchapter.

5 U.S.C. § 7512. Actions covered

This subchapter applies to--

(1) a removal;

(2) a suspension for more than 14 days;

(3) a reduction in grade;

(4) a reduction in pay; and

(5) a furlough of 30 days or less;

but does not apply to--

(A) a suspension or removal under section 7532 of this title,

(B) a reduction-in-force action under section 3502 of this title,

(C) the reduction in grade of a supervisor or manager who has not completed the probationary period under section 3321(a)(2) of this title if such reduction is to the grade held immediately before becoming such a supervisor or manager,

(D) a reduction in grade or removal under section 4303 of this title, or

(E) an action initiated under section 1215 or 7521 of this title.

5 U.S.C. § 7513. Cause and procedure

(a) Under regulations prescribed by the Office of Personnel Management, an agency may take an action covered by this subchapter against an employee only for such cause as will promote the efficiency of the service.

(b) An employee against whom an action is proposed is entitled to--

(1) at least 30 days' advance written notice, unless there is reasonable cause to believe the employee has committed a crime for which a sentence of imprisonment may be imposed, stating the specific reasons for the proposed action;

(2) a reasonable time, but not less than 7 days, to answer orally and in writing and to furnish affidavits and other documentary evidence in support of the answer;

(3) be represented by an attorney or other representative; and

(4) a written decision and the specific reasons therefor at the earliest practicable date.

(c) An agency may provide, by regulation, for a hearing which may be in lieu of or in addition to the opportunity to answer provided under subsection (b)(2) of this section.

(d) An employee against whom an action is taken under this section is entitled to appeal to the Merit Systems Protection Board under section 7701 of this title.

(e) Copies of the notice of proposed action, the answer of the employee when written, a summary thereof when made

orally, the notice of decision and reasons therefor, and any order effecting an action covered by this subchapter, together with any supporting material, shall be maintained by the agency and shall be furnished to the Board upon its request and to the employee affected upon the employee's request.

APPENDIX K

38 U.S.C. §7401. Appointments in Veterans Health Administration

There may be appointed by the Secretary such personnel as the Secretary may find necessary for the medical care of veterans (in addition to those in the Office of the Under Secretary for Health appointed under section 7306 of this title), as follows:

(1) Physicians, dentists, podiatrists, optometrists, registered nurses, physician assistants, and expanded-function dental auxiliaries.

(2) Psychologists (other than those described in paragraph (3)), dietitians, and other scientific and professional personnel, such as microbiologists, chemists, biostatisticians, and medical and dental technologies.

(3) Clinical or counseling psychologists who hold diplomas as diplomates in psychology from an accrediting authority approved by the Secretary, certified or registered respiratory therapists, licensed physical therapists, licensed practical or vocational nurses pharmacists, and occupational therapists.

APPENDIX L

38 U.S.C. § 7461. Adverse actions: section 7401 (1) employees

(a) Whenever the Under Secretary for Health (or an official designated by the Under Secretary for Health) brings charges based on conduct or performance against a section 7401 (1) employee and as a result of those charges an adverse personnel action is taken against the employee, the employee shall have the right to appeal the action.

(b)(1) If the case involves or includes a question of professional conduct or competence in which a major adverse action was taken, such an appeal shall be made to a Disciplinary Appeals Board under section 7462 of this title.

(2) In any other case, such an appeal shall be made—

(A) through Department grievance procedures under section 7463 of this title, in any case that involves or includes a question of professional conduct or competence in which a major adverse action was not taken or in any case of an employee who is not covered by a collective bargaining agreement under chapter 71 of title 5; or

(B) through grievance procedures provided through collective bargaining under chapter 71 of title 5 or through Department grievance procedures under section 7463 of this title, as the employee elects, in the case of an employee covered by a collective bargaining agreement under chapter 71 of title 5 that does not involve or include a question of professional conduct or competence.

(c) For purposes of this subchapter—

(1) Section 7401 (1) employees are employees of the Department employed on a full-time basis under a permanent

appointment in a position listed in section 7401 (1) of this title (other than interns and residents appointed pursuant to section 7406 of this title).

(2) A major adverse action is an adverse action which includes any of the following:

(A) Suspension.

(B) Transfer.

(C) Reduction in grade.

(D) Reduction in basic pay.

(E) Discharge.

(3) A question of professional conduct or competence is a question involving any of the following:

(A) Direct patient care.

(B) Clinical competence.

(d) An issue of whether a matter or question concerns, or arises out of, professional conduct or competence is not itself subject to any grievance procedure provided by law, regulation, or collective bargaining and may not be reviewed by any other agency.

(e) Whenever the Secretary proposes to prescribe regulations under this subchapter, the Secretary shall publish the proposed regulations in the Federal Register for notice-and-comment not less than 30 days before the day on which they take effect.

38 U.S.C. § 7462. Major adverse actions involving professional conduct or competence

(a) (1) Disciplinary Appeals Boards appointed under section 7464 of this title shall have exclusive jurisdiction to review any case--

(A) which arises out of (or which includes) a question of professional conduct or competence of a section 7401(1) employee; and

(B) in which a major adverse action was taken.

(2) The board shall include in its record of decision in any mixed case a statement of the board's exclusive jurisdiction under this subsection and the basis for such exclusive jurisdiction.

(3) For purposes of paragraph (2), a mixed case is a case that includes both a major adverse action arising out of a question of professional conduct or competence and an adverse action which is not a major adverse action or which does not arise out of a question of professional conduct or competence.

(b) (1) In any case in which charges are brought against a section 7401(1) employee which arises out of, or includes, a question of professional conduct or competence which could result in a major adverse action, the employee is entitled to the following:

(A) At least 30 days advance written notice from the Under Secretary for Health or other charging official specifically stating the basis for each charge, the adverse actions that could be taken if the charges are sustained, and a statement of any specific law, regulation, policy, procedure, practice, or other specific instruction that has been violated with respect to each charge, except that the requirement for notification in advance may be waived if there is reasonable cause to believe that the employee has committed a crime for which the employee may be imprisoned.

(B) A reasonable time, but not less than seven days, to present an answer orally and in writing to the Under Secretary for Health or other deciding official, who shall be an official higher in rank than the charging official, and to submit affidavits and other documentary evidence in support of the answer.

(2) In any case described in paragraph (1), the employee is entitled to be represented by an attorney or other representative of the employee's choice at all stages of the case.

(3) (A) If a proposed adverse action covered by this section is not withdrawn, the deciding official shall render a decision in writing within 21 days of receipt by the deciding official of the employee's answer. The decision shall include a statement of the specific reasons for the decision with respect to each charge. If a major adverse action is imposed, the decision shall state whether any of the charges sustained arose out of a question of professional conduct or competence. If any of the charges are sustained, the notice of the decision to the employee shall include notice of the employee's rights of appeal.

(B) Notwithstanding the 21-day period specified in subparagraph (A), a proposed adverse action may be held in abeyance if the employee requests, and the deciding official agrees, that the employee shall seek counseling or treatment for a condition covered under the Rehabilitation Act of 1973. Any such abeyance of a proposed action may not extend for more than one year.

(4) (A) The Secretary may require that any answer and submission under paragraph (1)(B) be submitted so as to be received within 30 days of the date of the written notice of the charges, except that the Secretary shall allow the granting of extensions for good cause shown.

(B) The Secretary shall require that any appeal to a Disciplinary Appeals Board from a decision to impose a major adverse action shall be received within 30 days after the date of service of the written decision on the employee.

(c) (1) When a Disciplinary Appeals Board convenes to consider an appeal in a case under this section, the board, before proceeding to consider the merits of the appeal, shall determine whether the case is properly before it.

(2) Upon hearing such an appeal, the board shall, with respect to each charge appealed to the board, sustain the charge, dismiss the charge, or sustain the charge in part and dismiss the charge in part. If the deciding official is sustained

(in whole or in part) with respect to any such charge, the board shall--

(A) approve the action as imposed;

(B) approve the action with modification, reduction, or exception; or

(C) reverse the action.

(3) A board shall afford an employee appealing an adverse action under this section an opportunity for an oral hearing. If such a hearing is held, the board shall provide the employee with a transcript of the hearing.

(4) The board shall render a decision in any case within 45 days of completion of the hearing, if there is a hearing, and in any event no later than 120 days after the appeal commenced.

(d) (1) After resolving any question as to whether a matter involves professional conduct or competence, the Secretary shall cause to be executed the decision of the Disciplinary Appeals Board in a timely manner and in any event in not more than 90 days after the decision of the Board is received by the Secretary. Pursuant to the board's decision, the Secretary may order reinstatement, award back pay, and provide such other remedies as the board found appropriate relating directly to the proposed action, including expungement of records relating to the action.

(2) If the Secretary finds a decision of the board to be clearly contrary to the evidence or unlawful, the Secretary may--

(A) reverse the decision of the board, or

(B) vacate the decision of the board and remand the matter to the Board for further consideration.

(3) If the Secretary finds the decision of the board (while not clearly contrary to the evidence or unlawful) to be not justified by the nature of the charges, the Secretary may mitigate the adverse action imposed.

(4) The Secretary's execution of a board's decision shall be the final administrative action in the case.

(e) The Secretary may designate an employee of the Department to represent management in any case before a Disciplinary Appeals Board.

(f) (1) A section 7401(1) employee adversely affected by a final order or decision of a Disciplinary Appeals Board (as reviewed by the Secretary) may obtain judicial review of the order or decision.

(2) In any case in which judicial review is sought under this subsection, the court shall review the record and hold unlawful and set aside any agency action, finding, or conclusion found to be--

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) obtained without procedures required by law, rule, or regulation having been followed; or

(C) unsupported by substantial evidence.

38 U.S.C. § 7463. Other adverse actions

(a) The Secretary shall prescribe by regulation procedures for the consideration of grievances of section 7401(1) employees arising from adverse personnel actions in which each action taken either--

(1) is not a major adverse action; or

(2) does not arise out of a question of professional conduct or competence.

Disciplinary Appeals Boards shall not have jurisdiction to review such matters, other than as part of a mixed case (as defined in section 7462(a)(3) of this title).

(b) In the case of an employee who is a member of a collective bargaining unit under chapter 71 of title 5, the employee may seek review of an adverse action described in subsection (a) either under the grievance procedures provided

through regulations prescribed under subsection (a) or through grievance procedures determined through collective bargaining, but not under both. The employee shall elect which grievance procedure to follow. Any such election may not be revoked.

(c) (1) In any case in which charges are brought against a section 7401(1) employee which could result in a major adverse action and which do not involve professional conduct or competence, the employee is entitled to the same notice and opportunity to answer with respect to those charges as provided in subparagraphs (A) and (B) of section 7462(b)(1) of this title.

(2) In any other case in which charges are brought against a section 7401(1) employee, the employee is entitled to--

(A) an advance written notice stating the specific reason for the proposed action, and

(B) a reasonable time to answer orally and in writing and to furnish affidavits and other documentary evidence in support of the answer.

(d) Grievance procedures prescribed under subsection (a) shall include the following:

(1) A right to formal review by an impartial examiner within the Department of Veterans Affairs, who, in the case of an adverse action arising from a question of professional conduct or competence, shall be selected from the panel designated under section 7464 of this title.

(2) A right to a prompt report of the findings and recommendations by the impartial examiner.

(3) A right to a prompt review of the examiner's findings and recommendations by an official of a higher level than the official who decided upon the action. That official may accept, modify, or reject the examiner's recommendations.

(e) In any review of an adverse action under the grievance procedures prescribed under subsection (a), the employee is

entitled to be represented by an attorney or other representative of the employee's choice at all stages of the case.

APPENDIX M

U.S. Department of Labor

Attorney General's Manual on the Administrative Procedure Act (1947)

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IX

SECTION 10--JUDICIAL REVIEW

The provisions of section 10 constitute a general restatement of the principles of judicial review embodied in many statutes and judicial decisions.[1] Section 10, it must be emphasized, deals largely with principles. It not only does not supersede special statutory review proceedings, but also generally leaves the mechanics of judicial review to be governed by other statutes and by judicial rules. For example, many statutes provide that where the reviewing court finds that the taking of new evidence would be warranted, such evidence must be presented to the agency with opportunity to modify its findings. *See* section 9 of the Securities Act (15 U.S.C. 77i). Such provisions continue in effect. Similarly, the time within which review must be sought will be governed, as in the past, by relevant statutory provisions or by judicial application of the doctrine of laches. *See* Section 5(c) of the Federal Trade Commission Act (15 U.S.C. 45 (c)) and *U.S. ex rel. Arant v. Lane*, 249 U.S. 367 (1919). Accordingly, the general principles stated in section 10 must be carefully coordinated with existing statutory provisions and case law.[2]

Section 10 is applicable irrespective of whether the agency action for which review is sought was governed by the procedural provisions of sections 4, 5, 7 and 8. However, section 10 does not apply to those agencies and functions which are excepted by section 2 (a) from all provisions of the Act except section 3. For example, the provisions of section 10 are in no way applicable to the review of agency action taken pursuant to the Housing and Rent Act of 1947.

Section 10 became effective on September 11, 1946, and is applicable from that date to the judicial review of agency action.[3] However, the Department of Justice, in briefs filed in the Supreme Court, has taken the position that section 10 does not apply to cases which were pending in the courts on September 11, 1946. While these cases were decided by the Supreme Court without

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any express reference to section 10, it seems fair to infer that the Court has accepted this construction. *United States v. Ruzicka*, 329 U.S. 287 (1946); *Board of Governors of the Federal Reserve System v. Agnew*, 329 U.S. 441 (1947); *Krug v. Santa Fe Pacific Rd. Co.*, 329 U.S. 591 (1947); *Patterson v. Lamb*, 329 U.S. 539 (1947).

SCOPE OF SECTION 10

Section 10 applies "Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion". The intended result of the introductory clause of section 10 is to restate the existing law as to the area of reviewable agency action. House Hearings (1945) p. 38 (Sen. Doc. p. 84).

A statute may in terms preclude, or be interpreted as intended to preclude, judicial review altogether. An example of a statute expressly precluding any judicial review is the Act of March 20, 1933 (38 U.S.C. 705) providing that "All decisions rendered by the Administrator of Veterans' Affairs under the provisions [of designated statutory sections] shall be final and conclusive on all questions of law and fact, and no other official or court of the United States shall have jurisdiction to review by mandamus or otherwise any such decision." Senate Hearings (1941) p. 1358. *Switchmen's Union of North America v. National Mediation Board*, 320 U.S. 297 (1943), illustrates the interpretation of a statute as intended to preclude judicial review although the statute does not expressly so provide.[4] Sen. Rep. pp. 43-44 (Sen. Doc. pp. 229-230).

The provisions of section 10 are applicable "Except so far as agency action is by law committed to agency discretion." For an example of such unreviewable agency action, *see United States v. George S. Bush & Co.*, 310 U.S. 371 (1940) (action by the President under section 336 (c) of the Tariff Act "if in his judgment" such action is necessary). More broadly, there are many statutory provisions which merely authorize agencies to make loans; under such statutes, the agencies' discretion is usually so complete that the refusal to make a loan is not reviewable under section 10 or

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any other statute. Also, the refusal by the National Labor Relations Board to issue a complaint is, as heretofore, an exercise of discretion unreviewable by the courts. *See Jacobsen v. National Labor Relations Board*, 120 F. 2d 96 (C.C.A. 3, 1941), and Senate Comparative Print of June 1945, p. 19, para. (3) (Sen. Doc. p. 38). For the same reason,

the denial of a petition pursuant to section 4 (d) of this Act for the issuance, amendment or repeal of a rule is not subject to judicial review. Sen. Rep. p. 44 (Sen. Doc. p. 230).

In addition, the introductory clause of section 10 provides a most important principle of construction for reconciling the provisions of the section with other statutory provisions relating to judicial review. All of the provisions of section 10 are qualified by the introductory clause, "*Except so far as* (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion" [Emphasis supplied]. The emphasized phrase does not me-an that every provision of section 10 is applicable except *where* statutes preclude judicial review altogether. Instead, it reads "*Except so far as* (1) statutes preclude judicial review", with the clear result that some other statute, while not precluding review altogether, will have the effect of preventing the application of some of the provisions of section 10. The net effect, clearly intended by the Congress, is to provide for a dovetailing of the general provisions of the Administrative Procedure Act with the particular statutory provisions which the Congress has moulded for special situations.[5] Thus, a civil service employee of the Federal Government who alleges unlawful removal from office, can obtain judicial review only of the question of whether the procedures of the Civil Service Act were followed. *Levine v. Farley*, 107 F. 2d 186 (App. D.C., 1939), certiorari denied, 308 U.S. 622. In such a case, the provisions of section 10(e), for example, relating to substantial evidence and to review of abuses of discretion, will not apply.

SECTION 10(a)--RIGHT OF REVIEW

Section 10(a) provides that "Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant

[Page 96]

statute, shall be entitled to judicial review thereof." This statement of the persons entitled to judicial review has occasioned considerable comment because of the use of the phrase "any person suffering legal wrong". This phrase was used as one of limitation and not for the purpose of making judicial review available to anyone adversely affected by governmental action.[6] The delicate problem of the draftsmen was to identify in general terms the persons who are entitled to judicial review. As so used, "legal wrong" means such wrong as particular statutes and the courts have recognized as constituting ground for judicial review. "Adversely affected or aggrieved" has frequently been used in statutes to designate the persons who can obtain judicial review of administrative action.[7] The determination of who is "adversely affected or aggrieved * * * within the meaning of any relevant statute" has "been marked out largely by the gradual judicial process of inclusion and exclusion, aided at times by the courts' judgment as to the probable legislative intent derived from the spirit of the statutory scheme". Final Report, p. 83; see also pp. 84-85. The Attorney General advised the Senate Committee on the Judiciary of his understanding that section 10(a) was a restatement of existing law. More specifically he indicated his understanding that section 10(a) preserved the rules developed by the courts in such cases as *Alabama Power Co. v. Ickes*, 302 U.S. 464 (1938); *Massachusetts v. Mellon*, 262 U.S. 447 (1923); *The Chicago Junction Case*, 264 U.S. 258 (1924); *Sprunt & Son v. U. S.*, 281 U.S. 249 (1930);

Perkins v. Lukens Steel Co., 310 U.S. 113 (1940); and Federal Communications Commission v. Sanders Brs. Radio Station, 309 U.S. 470 (1940). Sen. Rep. p. 44 (Sen. Doc. p. 230). This construction of section 10(a) was not questioned or contradicted in the legislative history.8 Also implied is the continuing role of the courts in determining, in the context of constitutional requirements and the particular statutory pattern, who is entitled to judicial review.

APPENDIX N

CONGRESSIONAL RECORD–SENATE

April 17, 1991

[p.8296]

their employment resolved in a timely fashion with an opportunity for outside review.

The need for these provisions is essentially twofold: To ensure that title 38 employees are afforded the same fundamental rights as other Government employees in terms of their employee-management relations, while protecting the special professional nature of title 38 employment; and to provide VA with an important tool in its ongoing efforts to recruit and retain qualified health-care personnel.

I am extremely pleased when, in the 101st Congress, the House finally initiated legislation to address the problems in VA's labor-management relations. That legislation, which was contained in title III of H.R. 4557, was introduced on April 19, 1990, reported by the House Veterans' Affairs Committee on April 26, 1990, and passed the House on May 1, 1990. Prior to House passage, the provisions contained in title III of H.R. 4557 were never addressed at a legislative hearing and there had been no public comment by interested groups on the specific provisions. Thus, the Senate Veterans' Affairs Committee, to which the bill was referred, included the provisions of title III in the committee's June 14, 1990, legislative hearing.

At that hearing, the committee received testimony from the AFGE, the National Federation of Federal Employees [NFFE], and the American Nurses Association [ANA]. All of the organizations expressed support for the intent of, and the general approach taken in, H.R. 4557 to provide collective bargaining rights to title 38 employees and to improve the methods of considering disciplinary actions brought against such employees. However, each of the organizations expressed concern over provisions limiting the scope of collective bargaining and granting to the Secretary exclusive, nonreviewable discretion as to what could be excluded from collective bargaining.

Secretary's determinations regarding negotiability; As passed by the House, section 301 of H.R. 4557 would have excluded from collective bargaining any matter that covered, or had any applicability to, or arose out of "professional conduct or competence," which was defined as "direct patient care, clinical competence, professional judgment, or peer review." Section 301 further provided that the determination of whether a matter or question concerned or arose out of professional conduct or competence would be determined by the Secretary and that the Secretary's determination would not be reviewable by any other agency or by any court. It was the unanimous opinion of the organizations testifying at the June 14 hearing that the secretary's determinations as to those issues – essentially, determinations as to their negotiability – should be subject to independent review by either the Federal Labor Relations Authority, the Federal Mediation and Conciliation Service, or the Federal Services Impasses Panel, as is done for bargaining agreements concluded under title 5.

Although the compromise agreement does not provide for independent agency review of the Secretary's negotiabililty decisions based on a "professional conduct or competence"

interpretation, the prohibition against court review of such decisions has been eliminated. Thus, the Secretary's determination that a matter or question involves, or arises out of, professional conduct or competence would be reviewable by a court of competent jurisdiction – most likely a Federal district court. I would have preferred that the Senate bill's approach be included – providing for agency review of negotiability decisions except in matters falling within the jurisdiction of disciplinary boards, but the compromise agreement does provide for a check on the Secretary's exercise of discretion in this area, which is of critical importance to maintaining a situation of good faith bargaining.

Scope of collective bargaining: Another concern raised by each of the organizations testifying at the June 14 hearing was the definition of "professional conduct or competence." Section 301 of H.R. 4557 as introduced defined professional conduct or competence as "direct patient care, clinical competence, professional judgment, or peer review." The American Nurses Association testified that such a definition "too broadly defines professional conduct or competency" and expressed that concern on the basis of their belief that "most of what professional nurses bargain for relates to professional competency and conduct" (S. Hrg. 101-1082, pages 435-36). Other organizations requested a clear indication of what types of activities would be considered related to professional conduct or competence.

The compromise agreement has deleted the reference to "professional judgment" as a definition for professional conduct or competence and is drafted so as to clarify that professional conduct or competence means only "direct patient care" or "clinical competence." Matters concerning peer review, most significantly the operations of the

Professional Standards Boards, would be excluded from collective bargaining under the compromise agreement, as would be matters related to the establishment, determination, or adjustment or employee compensation under title 38.

The exclusion form collective bargaining of matters concerning professional conduct or competence is designed to be limited to those matters that involve the manner in which health care is provided. Thus, the compromise agreement clarifies that professional competence and conduct relates only to matters involving direct patient care and clinical competence.

The compromise agreement would establish new disciplinary procedures and new procedures for employees to appeal adverse actions taken against them. These procedures are outlined in detail in the explanatory statement, which, as I noted earlier, I will ask to be inserted in the RECORD following my remarks. The new procedures are based upon the procedures generally applicable to Federal civilian employees under title 5 and would provide to title 38 employees the same notice, opportunity to respond, and representation rights as are provided to title 5 employees.

Under the compromise agreement, Disciplinary Appeals Boards would be created to consider appeals of major adverse actions which involve questions of professional conduct or competence. These Boards would replace the current disciplinary boards mandated under section 4110 of title 38. Whereas the section 4110 disciplinary boards determine charges and make recommendations to the Secretary regarding suitable disciplinary actions in a case, the Disciplinary Appeals Boards would hear appeals of cases in which a major adverse action involving an issue of professional conduct or

competence had already been taken. Disciplinary Appeals Boards would be comprised of three VA employees, each of whom would be required to be of the same grade or senior to the employee appealing the action and at least two of whom would be required to be employed in the same category of position as the employee. The latter requirement is included in light of the fact that the Boards would be evaluating issues of clinical competence and direct patient care, for which a knowledge of the specific profession would be needed. All members of a Disciplinary Appeals Boards would be appointed by the Secretary and would receive appropriate training in the functions and duties of Disciplinary Appeals Boards.

Mr. President, I believe the changes made by the compromise agreement will preserve the due process rights of title 38 employees against whom adverse actions are brought and ensure that disciplinary actions are concluded in a more timely fashion than under the current system, which all parties agree is far too time consuming and is inefficient. Under the new procedures, title 38 employees would not be forced to wait for as long a year, as is commonplace under the current system, to have their cases determined and the appeal process to begin. They would know the specific basis of any charge brought against them and would be assured that the Department present its findings and decisions within set periods of time. They would be afforded the right to be represented by an attorney or other representatives at all stages of

APPENDIX O

101st CONGRESS

2nd Session

HOUSE OF REPRESENTATIVES

Report 101-466

DEPARTMENT OF VETERANS AFFAIRS HEALTH PROFESSIONALS COMPENSATION AND LABOR-RELATIONS ACT of 1990

April 26, 1990, Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. Montgomery, from the Committee on Veterans' Affairs, submitted the following

REPORT

[To accompany H.R. 4557]

[Including cost estimate of the Congressional Budget Office]

The Committee on Veterans' Affairs, to whom was referred the bill (H.R. 4557) to amend title 38, United States Code, to improve the capability of the Department of Veterans Affairs to recruit and retain physicians and dentists

through increases in special pay authorities, to revise and improve recruitment and retention of nurses in the Department by providing greater flexibility in the pay system for nurses, to authorize collective bargaining over conditions of employment for health-care employees of the Department of Veterans Affairs, and for other purposes, having considered the same, report favorably thereon with amendments, by unanimous voice vote, and recommend that the bill as amended do pass.

The amendments (stated in terms of the page and line numbers of the introduced bill) are as follows:

Page 24, strike out lines 8 through 11 and insert in lieu thereof the following: "each place they appear (other than in subsections (d), (e), and (g) of section 4162 and in section 4163(b), both sections as redesignated by section 101)."

Page 33, line 9, strike out "section 101" and insert in lieu thereof "Section 101(a)"

Page 47, line 21, insert the following before the period: ", other than as part of a mixed case (as defined in section 4110A(a)(3) of this title)",

Page 47, beginning on line 25, strike out "which does not arise out of a question of professional conduct or competence".

* * *

[p.32]

Committee believes these actions by the Secretary should be rare, it believes the Secretary should have these options

available to ensure a just result in each case. Furthermore, the Secretary would have the executive authority to mitigate a penalty, if found not to be justified by the nature of the charges.

For the purposes of judicial review, the Secretary's execution of an appeals board decision would be the final administrative action and the point of exhaustion of administrative remedies. The Committee does not intend to change the usual course or scope of judicial review of title 38 disciplinary cases (except in the new determinations of whether a matter involves professional conduct or competence) and intends only to codify the opportunity for judicial review presently available, with an explicit reference to the substantial evidence standard applicable under a normal Administrative Procedures Act type of review.

Other adverse action procedures. – New section 4110B of title 38 would cover procedures for adverse actions which are not major or which do not involve professional conduct or competence. It clearly states that disciplinary appeals boards would not have jurisdiction over these matters (other than as part of mixed case). Employees who are members of collective bargaining units would have the option of review under a negotiated grievance procedure or under a departmental grievance procedure prescribed by the Secretary through regulations. Once the employee elects one or the other, the election would be irrevocable. The departmental grievance procedure would be required to include formal review by an impartial examiner within the Department, and, if the grievance involves professional conduct or competence, a grievance examiner would be selected from a panel designated under new section 4110C. Additionally, the departmental grievance procedure would include a right to a prompt report of findings and recommendations, a right to a

review of the findings and recommendations by an official higher in level than the proposing official, and an entitlement to representation.

Operation of Disciplinary Appeals Boards. – New section 4110C of title 38 would provide for the operation of disciplinary appeals boards. Such boards would be appointed by the Secretary and consist of three employees of the Department equal or senior in grade to the employee appealing the adverse action. The current provision of section 4110 on the size of the board would be changed because the Committee is not aware of any need for four or five member boards. The current provision for designation of a board chairman and secretary, and administration of oaths would be continued.

The Department informally advised the Committee that it would be desirable to include a provision allowing use as evidence in disciplinary proceedings, with appropriate safeguards against unauthorized disclosure, certain records which have strict disclosure and use limitations under sections 3301 and 4132 of title 38. The provision would impose heavy fines for unauthorized disclosures of restricted records used in disciplinary proceedings. The Committee believes such a provision would both facilitate consideration of all relevant evidence and protect individual privacy, and has therefore incorporated the Department's suggestion into the bill.

* * *

[p.57]

the Department of Medicine and Surgery, to determine, upon notice and fair hearing, charges of inaptitude, inefficiency, or misconduct of any person employed in a position provided in

paragraph (1) of section 4104 of this title. The majority of employees on a disciplinary board shall be employed in the same category of position as the employee who is the subject of charges.

[(b) The Administrator shall appoint the chairman and secretary of the board, each of whom shall have authority to administer oaths.

[(c) The Chief Medical Director may designate or appoint one or more investigators, to assist each disciplinary board in the collection and presentation of evidence. Any person answering to charges before a disciplinary board may be represented by counsel chosen by such person.

[(d) A disciplinary board, when in its judgment charges are sustained, shall recommend to the Administrator suitable disciplinary action, within limitations prescribed by the Administrator, which shall include reprimanded, suspension without pay, reduction in grade, and discharge from the Department of Medicine and Surgery of such person. The Administrator shall either approve the recommendation of the board, approve such recommendations with modification or exception, approve such recommendation and suspend further action at the time, or disapprove such recommendations. The Administrator shall cause to be executed such action as the Administrator approves. The decision of the Administrator shall be final.

[(e) The Administrator, within such limitations as the Administrator may prescribe may delegate to the Chief Medical Director the authority vested in the Administrator by subsections (b) and (d) of this section to (1) appoint the chairman and secretary of a disciplinary board, such official to have the power prescribed by this section, and (2) receive

and act upon recommendations of such a board. Any person against whom disciplinary action is taken under authority delegated pursuant to this subsection shall have the right to appeal such action to the Administrator, but in the absence of such an appeal the decision of the Chief Medical Director shall have the same force and effect as a decision of the Administrator.]

§ 4110. Adverse actions: section 4104(1) employees

(a) Whenever the Chief Medical Director (or an official designated by the Chief Medical Director) brings charges based on conduct or performance against a section 4104(1) employee and as a result of those charges an adverse personnel action is taken against the employee, the employee shall have the right to appeal the action.

(b)(1) If the case involves or includes a question of a professional conduct or competence in which a major adverse action was taken, such an appeal shall be made to a Disciplinary Appeals Board under section 4110A of this title.

(2) In any other case, such an appeal shall be made —

(A) through Department grievance procedures under section 4110B of this title, in any case that involves or includes a question of professional conduct or competence in which a major adverse action was not taken or in any case of an employee who is not covered by a collective bargaining agreement under chapter 71 of title 5; or

(B) through grievance procedures provided through collective bargaining under chapter 71 title 5 or through Department grievance procedures under section 4110B of this title, as the employee elects, in the case of an employee

covered by a collective bargaining agreement under chapter 71 of title 5 that does not involve or include a question of professional conduct or competence.

(c) For purposes of this section and sections 4110A, 4110B, and 4110C of this title —

(1) Section 4104(1) employees are employees of the Department employed on a full-time basis under a permanent appointment in a position listed in section 4104(1) of this title (other than interns and residents appointed pursuant to section 4114 of this title).

(2) A major adverse action is an adverse action which includes any of the following:

(A) Suspension.
(B) Transfer.
(C) Reduction in grade.
(D) Reduction in basic pay.
(E) Discharge.

(3) A question of professional conduct or competence is a question involving any of the following:

(A) Direct patient care.
(B) Clinical competence.
(C) Professional judgment.
(D) Peer review.

(d) An issue of whether a matter or question concerns, or arises out of, professional conduct or competence is not itself subject to any grievance procedure provided by law, regulation, or collective bargaining and may not be reviewed by any other agency or by any court.

(e) Whenever the Secretary proposes to prescribe regulations under this section or section 4110A, 4110B, or 4110C of this title, the Secretary shall publish the proposed regulations in the Federal Register for notice-and-comment no less than 30 days before the day on which they take effect.

§ *4110A. Major adverse actions involving professional conduct or competence*

(a)(1) Disciplinary Appeals Boards appointed under section 4110C of this title shall have exclusive jurisdiction to review any case —

(A) which arises out of (or which includes) a question of professional conduct or competence of a section 4104(1) employee; and

(B) in which a major adverse action was taken,

(2) The board shall include in its record of decision in any mixed case a statement of the board's exclusive jurisdiction under this subsection and the basis for such exclusive jurisdiction.

(3) For purposes of paragraph (2), a mixed case is a case that includes both a major adverse action arising out of a question of professional conduct or competence and an adverse action which is not a major adverse action or which does not arise out of a question of professional conduct or competence.

(b)(1) In any case in which charges are brought against a section 4104(1) employee which arises out of, or includes, a question of professional conduct or competence which could

result in a major adverse action, the employee is entitled to the following:

(A) Advance written notice from the Chief Medical Director or other charging official specifically stating the basis for each charge, the adverse actions that could be taken if the charges are sustained, and a statement of any specific law, regulation, policy, procedure, practice, or other specific instruction that has been violated with respect to each charge.

(B) An opportunity to present an answer orally and in writing to the Chief Medical Director or other deciding official, who shall be an official higher in rank than the charging official, and to submit affidavits and other documentary evidence in support of the answer.

(2) In any case described in paragraph (1), the employee is entitled to be represented by an attorney or other representative of the employee's choice at all stages of the case.

(3)(A) If a proposed adverse action covered by this section is not withdrawn, the deciding official shall render a decision in writing within 21 days of receipt by the deciding official of the employee's answer. The decision shall include a statement of the specific reasons for the decision with respect to each charge. If a major adverse action is imposed, the decision shall state whether any of the charges sustained arose out of a question or professional conduct or competence. If any of the charges are sustained, the notice of the decision to the employee shall include notice of the employee's rights of appeal.

(B) Notwithstanding the 21-day period specified in subparagraph (A), a proposed adverse action may be held in

abeyance if the employee requests, and the deciding official agrees, that the employee shall seek counseling or treatment for a condition covered under the Rehabilitation Act of 1973. Any such abeyance of a proposed action may not extend for more than one year.

(4)(A) The Secretary may require that any answer and submission under paragraph (1)(B) be submitted so as to be received within 30 days of the date of the written notice of the charges, except that the Secretary shall allow the granting of extensions for good cause shown.

(B) The Secretary shall require that any appeal to a Disciplinary Appeals Board from a decision to impose a major adverse action shall be received within 30 days after the date of service of the written decision on the employee.

(c)(1) When a Disciplinary Appeals Board convenes to consider an appeal in a case under this section, the board, before proceeding to consider the merits of the appeal, shall determine whether the case is properly before it.

(2) Upon hearing such an appeal, the board shall, with respect to each charge appealed to the board, sustain the charge, dismiss the charge, or sustain the charge in part and dismiss the charge in part. If the deciding official is sustained (in whole or in part) with respect to any such charge, the board shall —

(A) approve the action as imposed;

(B) approve the action with modification, reduction, or exception; or

(C) reverse the action.

(3) A board shall afford an employee appealing an adverse action under this section an opportunity for an oral hearing. If such a hearing is held, the board shall provide the employee with a transcript of the hearing.

(4) The board shall render a decision in any case within 45 days of completion of the hearing, if there is a hearing, and in any event no later than 120 days after the appeal commenced.

(d)(1) After resolving any question as to whether a matter involves professional conduct or competence, the Secretary shall cause to be executed the decision of the Disciplinary Appeals Board in a timely manner and in any event in not more than 90 days after the decision of the Board is received by the Secretary. Pursuant to the board's decision, the Secretary may order reinstatement, award back pay, and provide such other remedies as the board found appropriate relating directly to the proposed action, including expungement of records relating to the action.

(2) If the Secretary finds a decision of the board to be clearly contrary to the evidence or unlawful, the Secretary may —

(A) reverse the decision of the board, or

(B) reverse the decision of the board and remand the matter to the Board for further consideration.

(3) If the Secretary finds the decision of the board (while not clearly contrary to the evidence or unlawful) to be not justified by the nature of the charges, the Secretary may mitigate the adverse action imposed.

(4) The Secretary's execution of a board's decision shall be the final administrative action in the case.

(e) The Secretary may designate an employee of the Department to represent management in any case before a Disciplinary Appeals Board.

(f)(1) A section 4104(1) employee adversely affected by a final order or decision of a Disciplinary Appeals Board (as reviewed by the Secretary) may obtain judicial review of the order or decision.

(2) In any case in which judicial review is sought under this subsection, the court shall review the record and hold unlawful and set aside any agency action, finding, or conclusion found to be —

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) obtained without procedures required by law, rule, or regulation having been followed; or

(C) unsupported by substantial evidence.

§ 410B. Other adverse actions

(a) The Secretary shall prescribe by regulation procedures for the consideration of grievances of section 4104(1) employees arising from adverse personnel actions in which each action taken either —

(1) is not a major adverse action; or

(2) does not arise out of a question of professional conduct or competence.

Disciplinary Appeals Boards shall not have jurisdiction to review such matters, other than as part of a mixed case (as defined in section 4110A(a)(3) of this title).

(b) In the case of an employee who is a member of a collective bargaining unit under chapter 71 of title 5, the employee may seek review of an adverse action described in subsection (a) either under the grievance procedures provided through regulations prescribed under subsection (a) or through grievance procedures determined through collective bargaining, but not under both. The employee shall elect which grievance procedure to follow. Any such election may not be revoked.

(c) Grievance procedures prescribed under subsection (a) shall include the following:

(1) A right to formal review by an impartial examiner within the Department of Veterans Affairs, who, in the case of an adverse action arising from a question of professional conduct or competence, shall be selected form the panel designated under section 4110C of this title.

(2) A right to a prompt report of the findings and recommendations by the impartial examiner.

(3) A right to a prompt review of the examiner's findings and recommendations by an official of a higher level than the official who proposed the action.

(d) In any review of an adverse action under the grievance procedures prescribed under subsection (a), the employee is

entitled to be represented by an attorney or other representative of the employee's choice at all stages of the case.

§ *4110C. Disciplinary Appeals Boards*

(a) The Secretary shall from time to time appoint boards to hear appeals of major adverse actions described in section 4110A of this title. Such boards shall be known as Disciplinary Appeals Boards. Each board shall consist of three employees of the Department, each of whom shall be of the same grade as, or be senior in grade to, the employee who is appealing an adverse action. Members of a board shall be appointed from individuals on the panel established under subsection (d).

(b)(1) In appointing a board for any case, the Secretary shall designate one of the members to be chairman and one of the members to be secretary of the board, each of whom shall have authority to administer oaths.

(2) Appointment of boards, and the proceedings of such boards, shall be carried out under regulations prescribed by the Secretary. A verbatim record shall be maintained of board hearings.

(c)(1) Notwithstanding sections 3301 and 4132 of this title, the chairman of a board, upon request of an employee whose case is under consideration by the board (or a representative of that employee) may, in connection with the considerations of the board, review records or information covered by those sections and may authorize the disclosure of such records or information to that employee (or representative) to the extent the board considers appropriate for purposes of the proceedings of the board in that case.

(2) In any such case the board chairman may direct that measures be taken to protect the personal privacy of individuals whose records

APPENDIX P

38 U.S.C. § 4110. Disciplinary boards

(a) The Chief Medical Director, under regulations prescribed by the Administrator shall from time to time appoint boards to be known as disciplinary boards, each such board to consist of not less than three nor more than five employees, senior in grade, of the Department of Medicine and Surgery, to determine, upon notice and fair hearing, charges of inaptitude, inefficiency, or misconduct of any person employed in a position provided in paragraph (1) of section 4104 of this title. The majority of employees on a disciplinary board shall be employed in the same category of position as the employee who is the subject of the charges.

(b) The Administrator shall appoint the chairman and secretary of the board, each of whom shall have authority to administer oaths.

(c) The Chief Medical Director may designate or appoint one or more investigators, to assist each disciplinary board in the collection and presentation of evidence. Any person answering to charges before a disciplinary board may be represented by counsel chosen by such person.

(d) A disciplinary board, when in its judgment charges are sustained, shall recommend to the Administrator suitable disciplinary action, within limitations prescribed by the Administrator, which shall include reprimand, suspension without pay, reduction in grade, and discharge from the Department of Medicine and Surgery of such person. The

Administrator shall either approve the recommendation of the board, approve such recommendation with modification or exception, approve such recommendation and suspend further action at the time, or disapprove such recommendation. The Administrator shall cause to be executed such action as the Administrator approves. The decision of the Administrator shall be final.

(e) The Administrator, within such limitations as the Administrator may prescribe may delegate to the Chief Medical Director the authority vested in the Administrator by subsections (b) and (d) of this section to (1) appoint the chairman and secretary of a disciplinary board, such official to have the power prescribed by this section, and (2) receive and act upon the recommendations of such a board. Any person against whom disciplinary action is taken under authority delegated pursuant to this subsection shall have the right to appeal such action to the Administrator, but in the absence of such an appeal the decision of the Chief Medical Director shall have the same force and effect as a decision of the Administrator.

(Pub. L. 85-857, Sept. 2, 1958, 72 Stat. 1246; Pub. L. 88-207, Dec. 17, 1963, 77 Stat. 402; Pub. L. 98-160, title II, § 205, Nov. 21, 1983, 97 Stat. 1001; Pub. L. 99-576, title VII, § 701(88), Oct. 28, 1986, 100 Stat. 3299.)

AMENDMENTS

1986 – Subsec. (c), Pub. L. 99-576, § 701(88)(A), substituted "chosen by such person" for "of his own choosing".

Subsec. (d), Pub. L. 99-576, § 701(88)(B), substituted "The Administrator" for "He" and "the Administrator" for "he" in third sentence.

Subsec. (e), Pub. L. 98-576, § 701(88)(c), substituted "the Administrator" for "he" and "him" in first sentence.

1983 – Subsec. (a), Pub. L. 98-160 substituted "The majority of employees on a disciplinary board shall be employed in the same category of position as the employee who is the subject of the charges" for "When such charges concern a dentist, the majority of employees on the disciplinary board shall be dentists".

1963 – Subsec. (e), Pub. L. 88-207 added subsec. (e).

Supreme Court, U.S.
FILED
DEC 04 2006
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No. 06-394

In the Supreme Court of the United States

SUZANNE FLIGIEL, PETITIONER

v.

JIM NICHOLSON, SECRETARY OF THE DEPARTMENT OF VETERANS AFFAIRS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly affirmed a district court's denial of a claim that a physician employed by the Department of Veterans Affairs was transferred to another Department facility without adequate notice and an opportunity to respond as guaranteed by 38 U.S.C. 7463.

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In the Supreme Court of the United States

No. 06-394

SUZANNE FLIGIEL, PETITIONER

v.

JIM NICHOLSON, SECRETARY OF THE DEPARTMENT OF VETERANS AFFAIRS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The amended opinion of the court of appeals (Pet. App. 3a-17a) is reported at 440 F.3d 747. The initial opinion of the court of appeals (Pet. App. 18a-32a) is reported at 428 F.3d 621. The January 31, 2001, order of the district court granting the motion to dismiss petitioner's complaint (Pet. App. 58a-69a), the February 10, 2004, order of the district court denying the motion to alter or amend (Pet. App. 33a-39a), and the August 26, 2003, decision of the district court denying reconsideration under Federal Rule of Civil Procedure 54 (Pet. App. 40a-51a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 7, 2006. A petition for rehearing was denied on June 16, 2006 (Pet. App. 1a-2a). The petition for a writ of certiorari was filed on September 13, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner was appointed as a physician in the Veterans Health Administration within the Department of Veterans Affairs (DVA). DVA physicians are excepted from competitive service and thus not covered by the Civil Service Reform Act of 1978 (CSRA). 5 U.S.C. 2102(a)(1)(A), 2103, 4303, 7511(b)(10); 38 U.S.C. 7403(a)(1) and (2). Adverse actions against DVA physicians are governed by 38 U.S.C. 7461-7463.

Section 7461 creates two routes for administrative disciplinary proceedings for physicians. In cases involving "a question of professional conduct or competence in which a major adverse action was taken," including a transfer, administrative appeals are taken to a Disciplinary Appeals Board (DAB). 38 U.S.C. 7461(b)(1), (c)(2). A case involves "a question of professional conduct or competence" if there is "a question" involving "[d]irect patient care" or "[c]linical competence." 38 U.S.C. 7461(c)(3)(A)-(B). A DAB decision is reviewed by the Secretary of the DVA. 38 U.S.C. 7462(d). The decision of the Secretary is subject to judicial review under Section 7462(f), which authorizes the reviewing court to set aside the Secretary's decision. 38 U.S.C. 7462(f)(2)(A)-(C).

In all other cases in which an adverse personnel action is either "(1) is not a major adverse action; or (2) does not arise out of a question of professional conduct or compe-

tence," the aggrieved physician may invoke the grievance procedures set forth in 38 U.S.C. 7463. 38 U.S.C. 7463(a)(1)-(2). Section 7463 provides that the DAB does not have jurisdiction over such a case. 38 U.S.C. 7463(a). Rather, Section 7463 provides for a right to a hearing before an impartial hearing examiner with the right of subsequent review before "an official of a higher level than the official who decided upon the action." 38 U.S.C. 7463(d)(3). Unlike Section 7462, Section 7463 does not provide for any right of further review by a court.

2. Petitioner filed suit in June 2000 against the Department, the Secretary of the Department, and her immediate supervisor, alleging that the Department in October 1999 had violated her statutory due process rights under 28 U.S.C. 7461-7664 and her constitutional due process rights. Pet. App. 59a-60a. Those allegations arose from the decision of her supervisor, Michael K. Samson, to remove petitioner from her position as Chief of Pathology and Laboratory Medical Services at the John D. Dingell VA Medical Center in Detroit, Michigan, and to reassign petitioner to the Ann Arbor VA Medical Center, in Ann Arbor Michigan, as a staff pathologist. *Id.* at 60a. Petitioner's demand for a DAB hearing under 38 U.S.C. 7462 was denied. Pet. App. 60a. Four months later, petitioner amended her complaint to allege that her transfer constituted unlawful sex discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* Pet. App. 34a.

In an order dated January 31, 2001, the district court granted summary judgment for the government and dismissed petitioner's constitutional and statutory claims, holding that the reassignment was unrelated to her professional competence or conduct within the meaning of 38 U.S.C. 7462, and was not a major adverse action within

the meaning of Section 7463 because petitioner did not suffer any reduction in salary or rank and was not disciplinary in nature. Pet. App. 64a-65a, 69a. The court thus rejected petitioner's argument that she was entitled to the notice and hearing procedures applicable to charges under Section 7463. *Id.* at 65a n.6.

On May 22, 2002, petitioner filed a second amended complaint adding a Title VII claim of retaliation against defendants. Pet. App. 35a. On October 21, 2002, the district court granted petitioner's motion to file a third amended complaint alleging that in October 2001, defendants had permanently reassigned petitioner from her "detail" position in Ann Arbor, Michigan as the Chief of Pathology to a staff position in Saginaw, Michigan in violation of her statutory due process rights accorded by 38 U.S.C. 7461-7464. Pet. App. 54a-57a. Petitioner's Title VII claims were then tried to a jury, which returned a verdict in favor of the government. *Id.* at 35a, 52a-53a.

Petitioner sought reconsideration of the court's rejection of her statutory due process claim, in light of the evidence developed subsequent to the court's dismissal of the claim. In an order dated August 26, 2003, the district court denied that motion. Pet. App. 40a. In so holding, the district court reversed its prior holding that the transfer of petitioner was not a major adverse action within the meaning of 38 U.S.C. 7461(c)(2). The court concluded that the transfer was indeed a major adverse action based on the court's finding that petitioner's original detail was a pretext for disciplinary action. Pet. App. 46a. The court also found that the transfer was not based on petitioner's professional conduct or competence and that, therefore, petitioner had no right to the procedures accorded by Section 7462. *Id.* at 46a-47a.

Because the court found that petitioner had suffered a major adverse action not governed by Section 7462, the court concluded that petitioner's employment action was governed by Section 7463 and accordingly that petitioner should have been accorded the procedures for notice and opportunity for a hearing set forth in Section 7463. Pet. App. 47a, 49a. The court rejected the government's contention that the court lacked jurisdiction to review that claim under *United States* v. *Fausto*, 484 U.S. 439 (1988), as applied in *Pathak* v. *Department of Veterans Affairs*, 274 F.3d 28 (1st Cir. 2001). The court observed that *Pathak* had applied *Fausto* to hold that the DVA physician in that case did not have any right to judicial review from the results of a disciplinary action governed by Section 7463 because Congress had intentionally omitted any right to judicial review in direct contrast to the judicial review expressly allowed in employment actions governed by Section 7462. Pet. App. 48a. The court explained that *Pathak* was inapposite here because petitioner had not been accorded the procedures otherwise mandated by Section 7463, where as in *Pathak*, the DVA physician had been disciplined only after receiving all procedures mandated by Section 7463. *Id.* at 48a-49a.

The court rejected, however, petitioner's demand for reinstatement as a remedy for the Department's procedural violation, holding that the DVA's failure to provide petitioner with the Section 7463 procedures was harmless error. Pet. App. 49a-50a. The court explained that "the record of this case and the testimony at trial provided overwhelming evidence that [petitioner] was transferred and later reassigned because she either refused or was unable to perform the administrative and supervisory tasks of her position as Chief in a satisfactory manner." *Id.* at 50a. The court concluded that even had the DVA accorded

petitioner with the procedures required by Section 7463, "there is absolutely no indication or suggestion in this record that the [Department] would have modified its original decision to place her in some VA facility other than Detroit." *Ibid.* The court thus denied petitioner's request to set aside the court's January 31, 2001, order in which summary judgment was granted on the statutory due process claim. *Id.* at 51a.

3. The court of appeals affirmed. Pet App. 3a-17a. In the court's initial decision issued November 10, 2005, the court found it unnecessary to address petitioner's claim that the district court had erred in applying the doctrine of harmless error, holding that this district court lacked subject matter jurisdiction under *Fausto*. Pet. App. 23a. The court of appeals agreed with the trial court that petitioner's transfer "was a major adverse action" subject to Section 7463 and further explained that there was no right of judicial review from any decision rendered under Section 7463. *Ibid.* The court also found that the absence of judicial review from an adverse employment action governed by Section 7463 reflected Congress's intent to foreclose judicial review of petitioner's claim that she was denied the procedures mandated by Section 7463. *Id.* at 13a, 26a-32a.

The court of appeals issued an amended opinion on March 7, 2006. Pet. App. 3a-17a. That opinion was identical to the court's earlier opinion with the exception that the court of appeals added a new footnote five. In the footnote, the court observed that "[o]n appeal, [petitioner] challenged the denial of *statutory* due process. Therefore, we do not reach the issue of whether the preclusion of review extends to due process claims based on the United States Constitution." *Id.* at 17a n.5.

ARGUMENT

The court of appeals correctly held that any challenge to the merits of petitioner's transfers by the Department was barred by this Court's decision in *Fausto*. That holding is likewise in accord with the First Circuit's decision in *Pathak*. There is no conflict in the circuits with respect to that question, and petitioner claims none in her petition. While petitioner was erroneously denied the benefit of the Section 7463 procedures, that does not necessarily confer jurisdiction under the rule of *Fausto*. In any event, any such error was harmless on the unique facts presented in this case. The court of appeals' decision thus does not warrant this Court's review.

1. In *United States* v. *Fausto*, 484 U.S. 439 (1988), this Court held that an excepted service federal employee, for whom the CSRA did not then provide a right of review before the Merit System Protection Board or a court, could not obtain judicial review of an adverse personnel action under the Tucker Act or the Back Pay Act. The Court held that such an exclusion "displays a clear congressional intent to deny the excluded employees the protections of Chapter 75—including judicial review—for personnel action covered by that chapter." *Id.* at 447.

The principles recognized in *Fausto* have been extended beyond the Tucker Act and the Back Pay Act at issue in *Fausto* to include virtually every other type of suit by a federal employee seeking to challenge administrative disciplinary actions. *Mann* v. *Haigh*, 120 F.3d 34, 37-38 (4th Cir. 1997); *Ryon* v. *O'Neill*, 894 F.2d 199, 200 (6th Cir. 1990); *Stephens* v. *Department of Health & Human Servs.*, 901 F.2d 1571, 1576 (11th Cir.), cert. denied, 498 U.S. 998 (1990); *McAuliffe* v. *Rice*, 966 F.2d 979, 980 (5th Cir. 1992). There is no dispute in this case that petitioner

is an excepted service employee and thus excluded from the protections generally accorded federal employees under the CSRA. See p. 2, *supra*.

There is also no dispute that adverse actions against petitioner are governed by 38 U.S.C. 7461-7463. Section 7461 creates two routes for administrative disciplinary proceedings. In cases involving "a question of professional conduct or competence in which a major adverse action was taken," administrative appeals are reviewed by a DAB, whose decision is reviewed by the Secretary. 38 U.S.C. 7401(a), 7462(d). The Secretary's decision is expressly subject to judicial review. 38 U.S.C. 7462(f)(2). The district court held that this case did not present a question of professional conduct or competence under Section 7462. Pet. App. 46a-47a. The court of appeals accepted that ruling, *id.* at 25a, and petitioner does not contest that issue in this Court.

Because petitioner suffered a major adverse action that did not involve a question of professional conduct or competence, petitioner was subject to the grievance procedures set forth in Section 7463. As noted above, Section 7463 provides for a right to a hearing before an impartial hearing examiner with the right of review before "an official of a higher level than the official who decided upon the action." 38 U.S.C. 7463(d)(3). However, unlike Section 7462, Section 7463 does not provide for any right of judicial review. The district court held that petitioner should have been accorded these Section 7463 procedures and the court of appeals likewise accepted that ruling. Pet. App. 25a.

Congress's inclusion of an express avenue for judicial review under Section 7462 and the total absence of any such authorization for judicial review in Section 7463 reflects Congress's deliberate choice to preclude judicial

review following the administrative proceedings conducted under Section 7463. See, *e.g.*, *Russello* v. *United States*, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."). Indeed, Section 7463 makes clear that Congress knew how to incorporate the remedies provided under 7462. Thus, Section 7463(c)(1) provides that if charges brought against a physician "could result in a major adverse action and which do not involve professional conduct or competence, the employee is entitled to the same notice and opportunity to answer * * * provided in subparagraphs (A) and (B) of section 7462(b)(1) of this title." That incorporated Section addresses only the procedures to be used in the initial administrative proceedings. The right of judicial review under Section 7462(f) is, in contrast, specifically limited to review of decisions of the Secretary and the DAB under Section 7462(d). It would have been a simple matter for Congress to cross-reference Section 7462(f) had Congress intended to provide such judicial review under Section 7463.

Based on the above statutory scheme, the First Circuit in *Pathak* held that the absence of judicial review from Section 7463 proceedings was "persuasive evidence that Congress deliberately intended to foreclose further review of such claims." 274 F.3d at 32 (quoting *United States* v. *Erika, Inc.*, 456 U.S. 201, 208 (1982)). As the *Pathak* court explained, "these statutory provisions generally offer the Secretary greater discretion in employment-related decisions (e.g., hiring) regarding [DVA physicians] than he would have over other civil servants." *Ibid.* The First Circuit thus correctly concluded that because neither the

CSRA nor Section 7463 provides for judicial review, DVA physicians "may not rely on the Administrative Procedure Act as an independent source of review." *Id.* at 32-33).*

2. Petitioner does not contend that *Pathak* was wrongly decided. Rather, petitioner contends only that *Pathak* is inapplicable here because the VA physician in *Pathak* had been accorded all the procedures mandated by Section 7463 while petitioner in this case was erroneously accorded none of this procedures with respect to the transfers and reassignments she challenged. Pet. 11. But the availability of jurisdiction does not depend on the procedures that the claimant allegedly received. In any event, regardless of its impact on the jurisdictional determination, the allegedly erroneous denial of the procedural protections accorded by Section 7463, however, does not warrant plenary review by this Court.

As noted, the district court held that the transfers and reassignments of petitioner were "major adverse action[s]." Pet. App. 46a. The court of appeals did not disturb that ruling. *Id.* at 13a, 25a. The procedures specified by Section 7463 therefore should have been provided. Petitioner did not bring suit, however, merely to obtain the Section 7463 procedures. Rather, petitioner seeks a judicial order of reinstatement to her former position as a supervisor "at the Detroit VA." *Id.* at 49a. As court of appeals properly

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* The court in *Pathak* further found that it need not consider the plaintiff's due process constitutional claim because it was "not even colorable" on the facts of that case. 274 F.3d at 33. The court of appeals in this case similarly was not confronted with any constitutional claim as petitioner challenged on appeal only "the denial of *statutory* due process." Pet. App. 17a n.5. Petitioner likewise does not raise any constitutional claim in her petition. This case thus does not present any preclusion of constitutional claims at issue in *Whitman* v. *Department of Transp.*, 126 S. Ct. 2014 (2006).

held, that sort of relief is barred by *Fausto* as applied in *Pathak*, because there is no judicial review of the merits of the VA's decision to discipline petitioner with respect to the transfers, even if the procedures of Section 7463 had been followed and the agency determined that the employment actions were proper.

Even assuming that petitioner was entitled to bring suit under the Administrative Procedure Act, 5 U.S.C. 706(2)(D), not to seek reinstatement but to compel the "observance of procedure required by law," petitioner would not be entitled to relief on the record here. In conducting that review, the APA provides that the reviewing court must also take "due account * * * of the rule of prejudicial error." 5 U.S.C. 706. Similarly, a reviewing court will not order a remand to the agency where such a "remand would be an idle and useless formality." *NLRB* v. *Wyman-Gordon Co.*, 394 U.S. 759, 766 n.6 (1969) (plurality opinion). Courts are thus not required to "convert judicial review of agency action into a ping-pong game." *Ibid.*

The district court correctly applied the rule of harmless error in this case, holding that "the Secretary's failure to provide the [Section 7463] due process protections, to which [petitioner] was entitled, was a harmless error." Pet. App. 49a. Based on the district court's independent review of the record and the jury's verdict in the Title VII proceeding, the district court was convinced that petitioner was transferred and reassigned "because she either refused or was unable to perform the administrative and supervisory tasks of her position as Chief in a satisfactory manner." *Id.* at 50a. As the trial court found, the jury rejected the very claims on the merits that petitioner would raise in any Section 7463 proceeding. *Ibid.* ("During the trial [petitioner] complained that the decision to transfer

her was, at least in part, motivated by her gender. The jury thought otherwise and returned a verdict in favor of the Secretary, which further confirms * * * that her transfer was prompted by her deficiencies as an administrator and supervisor."). The trial court thus properly found that even if petitioner had been given all the Section 7463 procedural protections, "there is absolutely no indication or suggestion in this record that the [Veterans Health Agency] would have modified its original decision to place her in some VA facility other than Detroit." *Ibid.*

As explained above, an agency's discipline of a VA physician after exhaustion of the Section 7463 procedures is not subject to judicial review, a principle that petitioner does not contest. If there is no judicial review of the merits of the agency's disciplinary decision and if, as here, it is apparent that the agency would have reached the same decision even after according the Section 7463 procedures, there is no basis for a reviewing court to reinstate petitioner to a position pending completion of those procedures, the relief demanded by petitioner. A remand to comply with Section 7463 would be "an idle and useless formality." *Wyman-Gordon Co.*, 394 U.S. at 766 n.6.

Those reasons likewise counsel against this Court's plenary review. The most petitioner could ever obtain is a remand for the agency to follow Section 7463 procedures with any ultimate agency decision not subject to review. Such a remand would be unique to this case and does not involve any important or recurring issue of law. Indeed, the agency's failure to follow Section 7463 procedures flowed from the agency's conclusion that the transfer was a "detail" rather than a permanent reassignment and thus was not a major adverse action as defined by the statute. Pet. App. 64a. While petitioner's supervisors may have erred in the conclusion, as the district court

ultimately held, such an error does not involve any recurring issue of law on which petitioner seeks review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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In the Supreme Court of the United States

SUZANNE FLIGIEL, M.D.,

Petitioner,

v.

ANTHONY J. PRINCIPI, in his capacity as Secretary, Department of Veterans Affairs,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITIONER'S REPLY BRIEF

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NEW QUESTION PRESENTED

The government's reliance on the "harmless error" finding of the District Court to defeat the Petition for Certiorari presents a third question for the Court's consideration, one that requires the Court to determine whether this doctrine can be applied to a procedural error involving "root requirement" due process requirements mandated by statute.

PARTIES TO THE PROCEEDINGS

Petitioner is Suzanne Fligiel, M.D.

Respondent is Anthony J. Principi, in his capacity as Secretary, Department of Veterans Affairs

Individual Defendants Michael K. Samson, M.D., and all other individual defendants were dismissed by stipulation and order of the trial court.

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ARGUMENT

References to Pet. App. are to the appendix in the Petition for Writ of Certiorari.

The issue of whether violations of procedures mandated by statute can be waived under a harmless/prejudicial error analysis was briefed at the appellate level, but the panel did not reach the issue because it found a lack of jurisdiction. The government's Brief in Opposition assumes the correctness of the district court's holding.

Under the Department of Veterans Affairs Health-Care Personnel Act of 1991 (VAPA)(set out at Pet. App. K and L at 77a, 78a) before the agency may impose a "major adverse action" in the form of a disciplinary transfer on a tenured excepted service employee, 38 U.S.C. §§7401, 7461 (Id., at 77a), the agency is required to provide, (38 U.S.C. §7462 (b)(1), made applicable by 38 U.S.C. §7463(c)(1))-

> (A) At least 30 days advance written notice from the ...charging official specifically stating the basis for each charge, the adverse actions that could be taken if the charges are sustained, and a statement of any specific law, regulation, policy, procedure, practice, or other specific instruction that has been violated with respect to each charge...
> (B) A reasonable time, but not less than seven days, to present an answer orally and in writing to the ...deciding official...and to submit affidavits and other documentary evidence in support of the answer.

The district court found that no notice or opportunity to respond had been provided. (Pet. App. E at 49a) No appropriate administrative record existed. To support its

holding that the procedural omissions were harmless error, the court used the record created in the trial on the claims of gender discrimination and a failure to provide the required procedure.

At the appellate level petitioner's brief contended that the district judge had no authority to construct the agency's record for it and that the resultant conclusion of law was impermissible under *Securities and Exch. Comm'n v. Chenery,* 318 U.S. U.S. 80, 88 (1943)(court may not act as jury, court may not intrude upon the domain entrusted to an agency). Moreover, petitioner maintained that the trial record constituted an unacceptable basis for decision because the trial testimony was a "post hoc rationalization" since it was given almost four years after the major adverse action rather than as a "basis articulated in the order," citing *Burlington Truck Lines v. United States,* 371 U.S. 156, 169 (1962).

In addition, Petitioner relied on *Wilson v. Comm'r of Soc. Sec.*, 378 F.3d 541, 546 (6th Cir. 2004) which stated:

> "A court cannot excuse the denial of a mandatory procedural protection [on harmless error grounds] simply because [as the agency urges] there is sufficient evidence in the record...and, thus, a different outcome on remand is unlikely...To hold otherwise, and to recognize substantial evidence as a defense to non-compliance with the [statute] would afford the [agency] the ability to violate the regulation with impunity and render the protections promised therein illusory."

Petitioner also cited *Am. Farm Lines v. Black Ball Freight Serv.*, 397 U.S. 532, 538-539 (1970) in the appellate brief where the Court, in a strong dictum, found "harmless error"

where there were challenges to procedures intended to facilitate the orderly transaction of business but carefully excluded rules "intended primarily to confer important procedural benefits upon individuals in the face of otherwise unfettered discretion." This dictum was converted into an explicit requirement for notice and an opportunity to respond in *Cleveland Board of Education v. Loudermill,* 470 U.S. 532 (1985) by its holding that the "root requirements" of due process of notice and an opportunity to respond can not be withheld. The fact that the requirements that petitioner claims are identical to the *Loudermill* "root requirements" but appear in a statute should not exclude them from review based on the statute.

The flaw in the government's Brief in Opposition is that it impermissibly elided the distinction between the review of fact questions and the review of procedure questions (5 U.S.C. 706(2)(A), (D) (Pet. App. I at 71a). How else can one explain the following statement in its brief, at 10, that "the availability of jurisdiction does not depend on the procedures that claimant allegedly received." Petitioner takes that to mean, in context, that one can't get jurisdiction based on procedural errors and that harmless error disposes of the non-existent challenge to the adverse personnel action. First, an objection to the use of the word "allegedly" - the trial court found that petitioner had received no notice or an opportunity to respond before the adverse personnel actions (Pet. App. E at 49a).

Second, a number of controlling Supreme Court precedents directly contradict the government statement in their holding that jurisdiction is available for procedural errors when substantive review is not. Petitioner cited *Lindahl v. Office of Personnel Management,* 470 U.S. 768 (1985) in its Petition to this court. In *Lindahl*, at 776, the

Court considered the claim of a civilian security guard that the Office of Personnel Management had impermissibly shifted the burden of proof of disability to him rather than requiring the agency to disprove disability under the circumstances of his case. Although the statute "thrice repeated in a single sentence" that the agency's decision on disability status was final (at 778, quoting from the Federal Circuit's en banc opinion that was reversed), the Court held, at 791, that review is available to determine whether 'there has been a substantial departure from important procedural rights, a misconstruction of the governing legislation, or some like error 'going to the heart of the administrative determination [citation omitted].'"

Lindahl is cited three times by the majority opinion in *United States v. Fausto*, 484 U.S. 439, 443, 450 and 451, and there is no indication that the earlier decision was to be limited in any way. Nor could there be because the facts of the two cases were very different- in *Fausto* the claimant sought to challenge the agency's substantive adverse decision by using another statute while in *Lindahl,* the claimant, like petitioner, challenged the failure to provide the procedures under the statute which governed the substantive decision.

Several other Supreme Court cases have found jurisdiction to review questions of law or procedure when the governing statute precludes substantive review of fact-based decisions. In *Bowen v. Michigan Academy of Family Physicians,* 476 U.S. 667, 678 (1986), the court, in an 8-0 decision, held that jurisdiction was available to review the method by which payment amounts for medical services were calculated although review was precluded as to the actual amounts chosen. In *Oestereich v. Selective Service System Local Board 11,* 393 U.S. 233, 239 (1968), and *Leedom v. Members of the National Labor Relations,* 358 U.S. 184, 191

(1958), the court found jurisdiction to consider claims that alleged that the agency's action exceeded its authority although the respective agencies fact decisions were precluded from review. In *Leedom* it held that "[W]here, as here, Congress has given a "right" to the professional employees it must be held that it intended that right to be enforced and 'the courts...encounter no difficulty in fulfilling its purpose,' *Texas & New Orleans R. Co. v. Railway Clerks,* 281U.S. 548, 568 (1930).'" even though substantive review of the agency's decision was unavailable.

For the reasons given, petitioner believes that the government is without legal authority to elide §§706(2)(A) and (D) (Pet. App. I at 71a) and then to apply the doctrine of harmless error to the agency's adverse personnel decision. Given the legislative history described in the initial petition, at 10-16, and the cases cited here, federal courts have jurisdiction to review the denial of notice and an opportunity to respond under §706(2)(D) of the APA, although they may not grant review under §706(2)(A) for the actual personnel decisions of the VA. The denial of all statutory due process, because it deprived petitioner of rights characterized as "root requirements" in *Loudermill* and because it resulted in an agency decision without a proper record, are so serious that a court with jurisdiction ought to set aside the agency action as authorized by the APA.

A final word about the government's comment that remand would be an "idle and useless formality (citation omitted)" because the agency could simply do what it was required to do seven years ago and come to the same conclusion, at p. 12 brief in opposition. While it is true that laches is not a defense against the sovereign, *Costello v. United States,* 365 U.S. 265, 281 (1961), suggested a willingness to reconsider that principle if the government did

not meet the two requirements it set out and the application of the principle would not serve the policy underlying the principle.

In that case the government moved to revoke the citizenship of an individual 27 years after it was obtained on the grounds of fraudulent procurement. The court specified that it would "assume the applicability of laches," at 282, and then laid out the two required elements: "(1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense." More importantly, at 281, "the reason underlying the principle, said Mr. Justice Story, is 'to be found in the great public policy of preserving the public rights, revenues, and property from injury and loss, by the negligence of public officers," citing *United States v. Hoar,* 26 Fed. Cas. 329,330 (No. 15,373).

It is difficult to conceive of a public policy that would be served by allowing an agency to violate a statute with impunity, in effect to operate as "basically lawless" as noted in *Osterreich,* at 237, where the court found jurisdiction to avoid that outcome. Petitioner also believes there is sufficient record evidence to establish the two elements required by *Costello.*

The government is misinformed in its assertion that "the most petitioner could ever obtain (Brief in Opposition at 12)" is the procedures she never got. Section 706 authorizes the court to "set aside agency decision...found to be (D) without observance of procedure required by law (Pet. App. I at 71)." This would void the agency's action (See *Londoner v. Denver,* 210 U.S. 373, 386 (1908)(assessment without proper process is "void"), would consequently require the agency to remove all references to the action from her file as requested and, in view of the agency's blatant disregard of the law,

should lead to her reinstatement (See *Franklin v. Gwinnett Cty. Pub. Sch*, 503 U.S. 60, 70-71 (1992)(federal courts free to fashion any appropriate relief, absent "clear direction to the contrary by Congress"), particularly in light of the trial court's finding that none of what happened had anything to do with petitioner's professional conduct or competence as a physician (Pet. App. E at 46a) and which was, in fact, outstanding over the course of her tenure as Laboratory Director as shown in trial testimony.

The government is also somewhat disingenuous in its assertion that "a remand would be unique to this case (Brief in Opposition at 12)." While this is always literally true, the Court's decision as precedent would discourage a repeat of this lawless behavior in any future major adverse actions in the population of over one million federal employees classified as non-preference excepted service employees (Petition at 8).

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted.

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